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| **Corporate Law Bulletin****Bulletin No. 76, December 2003**Editor: Professor Ian Ramsay, Director, Centre for Corporate Law and Securities RegulationPublished by [LAWLEX](http://www.lawlex.com.au" \t "default) on behalf of [Centre for Corporate Law and Securities Regulation](http://cclsr.law.unimelb.edu.au" \t "_new), Faculty of Law, the University of Melbourne with the support of the [Australian Securities and Investments Commission](http://www.asic.gov.au" \t "_new), the [Australian Stock Exchange](http://www.asx.com.au" \t "_new) and the leading law firms: [Blake Dawson Waldron](http://www.bdw.com.au" \t "_new), [Clayton Utz](http://www.claytonutz.com" \t "_new), [Corrs Chambers Westgarth](http://www.corrs.com.au" \t "_new), [Freehills](http://www.freehills.com" \t "_new), [Mallesons Stephen Jaques](http://www.mallesons.com" \t "_new), [Phillips Fox](http://www.phillipsfox.com" \t "_new).***Use the arrows to navigate easily across the bulletin***= back to Brief Contents = back to top of current section |
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| **1. Recent Corporate Law and Corporate Governance Developments** |
| **1.1 Draft Code of Conduct for soft dollar payments**On 16 December 2003, the Investment and Financial Services Association (IFSA) and the Financial Planning Association of Australia (FPA) released a Draft Code of Conduct on Alternative Remuneration (soft dollar payments) that regulates certain industry remuneration practices and that will be adopted by members of each Association.The Draft Code incorporates three key proposals:         Banning of practices such as gifts and conferences that are linked to product sales;          The establishment and maintenance of a public register for payments and receipts of appropriate transactions with a value greater than $300;         Comprehensive disclosure in appropriate regulatory documents such as the Product Disclosure Statement (PDS) and Financial Services Guide (FSG) of appropriate types of alternative remuneration. The Code is in response to changing community expectations and is the latest initiative implemented by the financial services industry to improve operating practices and transparency on remuneration. The Code will form a key part of the FPA’s Professional Code of Conduct and will become an IFSA Standard. Throughout the year both groups have implemented a number of joint initiatives such as improvements to the Product Disclosure Statement, Financial Services Guide and Statement of Advice. The draft Code of Conduct is now being circulated for comment throughout the industry and the two organisations hope to finalise it by the end of February, for operation shortly thereafter.For further information please contact:Richard Gilbert, CEO of IFSA on 0417 247 998Kerrie Kelly, CEO of FPA on 0400 513 585For copies of the Briefing paper “IFSA/ FPA Code of Practice – Disclosure of Alternative Forms of Remuneration” please see the [IFSA](http://www.ifsa.com.au/%22%20%5Ct%20%22_new) or [FPA](http://www.fpa.asn.au/%22%20%5Ct%20%22_new) websites.**1.2 CLERP (Audit Reform and Corporate Disclosure) Bill introduced into Parliament**On 4 December 2003, the Treasurer, the Hon Peter Costello, introduced the [Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Bill](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=74342" \t "default) into Parliament. The Bill represents the ninth instalment of the Government’s corporate law reform program.Significant measures contained in the Bill include: **(a) Continuous Disclosure**         ASIC will have the power to issue infringement notices to disclosing entities where ASIC has reason to believe that have been breaches of the continuous disclosure provisions in the [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default). The notices will contain financial penalties based upon a company’s market capitalisation, up to a maximum of $100,000. The power will enable the corporate regulator with the ability to deal with less serious contraventions of disclosure laws in a more timely manner.          The maximum civil penalty that a court can impose on a body corporate for breaching continuous disclosure requirements will increase from $200,000 to $1 million. **(b) Executive Remuneration**         Directors’ and senior executives’ remuneration is to be clearly disclosed in a remuneration report, contained in the directors’ report.          The Bill expands the number of executives whose remuneration must be disclosed, from the top 5 within the listed company to the top 5 across the corporate group in addition to the top 5 within the listed company.          Directors will be required to hold a non-binding shareholder vote to adopt the remuneration disclosures within the remuneration report. This recognises that directors, while responsible for setting executive remuneration, are accountable to shareholders for their decisions. **(c) Audit Oversight and Independence**         The Bill establishes a regulatory framework governing audit oversight and independence. It provides for the Financial Reporting Council (FRC) to have oversight over a reconstituted Australian Auditing Standards Board, with a Government-appointed Chair. The FRC will also have an oversight role to advise the Treasurer in relation to auditor compliance with independence requirements.          Auditing standards will have the force of law. There will be a 2 year transition period to enable the auditing standards setter to re-issue standards in a format suitable for legal enforcement.          Mandatory auditor rotation for listed companies will be required after 5 consecutive years (with an option for ASIC to extend the period to 7 consecutive years where appropriate).          Significant post-audit employment restrictions, including a 2 year ‘cooling off’ period for auditor partners wishing to join a client as a director or senior manager, will be imposed. The Bill responds to the recommendations of the Ramsay Report on the independence of Australian company auditors and takes account of relevant recommendations of Report 391 of the Joint Parliamentary Committee of Public Accounts and Audit. The Bill also incorporates recommendations of the HIH and Cole Royal Commissions.The Bill is available on the [Parliament of Australia](http://www.aph.gov.au/%22%20%5Ct%20%22_new) website. **1.3 SEC takes steps to address late trading, market timing and related abuses**On 3 December 2003, the United States Securities and Exchange Commission took action on three measures to address late trading, market timing and related abuses in the mutual fund industry.The Commission voted to propose a rule requiring that fund orders be received by 4:00 p.m. Specifically, this proposal would require that an order to purchase or redeem mutual fund shares be received by the mutual fund — or its primary transfer agent or a registered securities clearing agency — by the time that the fund establishes for calculating its net asset value in order to receive that day's price (typically 4:00 p.m. for most funds). This rule would effectively eliminate the potential for late trading through intermediaries that sell fund shares. A public comment period concerning this proposal will run for 45 days following its publication in the Federal Register.The Commission also voted to adopt a compliance rule that will require funds and advisers to (i) have compliance policies and procedures, (ii) annually review them and (iii) designate a chief compliance officer who, for funds, must report to the board of directors. Designated compliance officers and written policies and procedures will have several benefits, including having a designated person charged with fund compliance who must answer to, and be accountable to, the fund's board of directors, thereby enhancing compliance oversight by directors, as well as allowing the SEC's examination staff to review the reports made to the board. Compliance with this rule will be required no later than nine months after its publication in the Federal Register. Finally, the Commission voted to propose enhanced disclosure requirements. These enhancements would require funds to disclose (i) market timing policies and procedures, (ii) practices regarding "fair valuation" of their portfolio securities and (iii) policies and procedures with respect to the disclosure of their portfolio holdings. This type of explicit disclosure would shed light on market timing and selective disclosure of portfolio holdings so that investors could better understand the fund's policies and how funds manage the risks in these areas. A public comment period concerning these proposals will run for 45 days following their publication in the Federal Register.**1.4 Committee reviewing Canada’s securities regulation structure publishes research papers on regulatory reform efforts in the US, EU and Australia**On 25 November 2003, the Committee to Review the Structure of Securities Regulation in Canada published three research studies prepared by independent experts in the United States, the European Union and Australia. The studies were commissioned by the Committee to provide a comparative analysis of regulatory structures and reform efforts in each of these jurisdictions. The Committee expects to deliver its report to the Canadian Minister of Finance in December. The following studies, as well as submissions received from nearly 100 market participants, are available at [www.wise-averties.ca](http://www.wise-averties.ca/%22%20%5Ct%20%22_new)         "The United States Federal-State Model of Securities Regulation" by Professor Joel Seligman, Dean, Washington University School of Law, St. Louis, and author of the definitive history, The Transformation of Wall Street: A History of the Securities and Exchange Commission and Modern Corporate Finance.         "Securities Market Regulation in the EU: The Relation Between the Community and Member States" by Karel Lannoo and Mattias Levin, Centre for European Policy Studies (CEPS), Brussels.         "The Impact of Federalising Securities Regulation in Australia: A View from the Periphery" by Ralph Simmonds, Dean and Foundation Professor of Law, School of Law, Murdoch University, and Ray Da Silva Rosa, Associate Professor, Department of Accounting and Finance, The University of Western Australia. The mandate of the Committee is to undertake an independent objective review of the current securities regulatory framework and identify an appropriate model for securities regulation in Canada. **1.5 United States Congress passes legislation to reform the mutual fund industry**On 19 November 2003, the United States Congress approved the Mutual Funds Integrity and Fee Transparency Act, H.R. 2420, which will benefit America’s 95 million mutual fund investors by increasing transparency of fund fees and costs, by strengthening corporate governance and management integrity, and by establishing measures to prevent fraudulent trading practices.H.R. 2420 would:**(a) Provide investors with more information about fees:**The Bill would direct the SEC to issue rules requiring funds to provide investors with improved disclosure of the following:         Estimated operating expenses, in dollar amounts, on a hypothetical $1,000 investment.         Portfolio turnover rates in a way that facilitates comparison among funds.         Soft dollar arrangements.         Directed brokerage arrangements used to obtain fund distribution.         Revenue sharing arrangements used to obtain fund distribution.**(b) Increase transparency:**The Bill would give investors access to enhanced information about fund internal operations and potential conflicts of interest associated with mutual fund sales and internal workings to help mitigate those conflicts and help investors make informed investment decisions. Provisions included in the Bill would:         Codify SEC rules requiring the disclosure of votes cast on behalf of shareholders as well as the policies and procedures for proxy voting.         Require each fund to have a code of ethics, which would have to be disclosed, as well as any waivers or violations of such codes.          Require that funds disclose the structure of portfolio manager compensation.         Require fund managers to disclose any holdings they have in the funds they manage.         Require that brokers disclose to investors whether they have received extra financial incentives to sell a particular fund or class of shares.         Require notification in brokerage account statements that fees have been deducted.         Direct the SEC to issue a concept release on how to better disclose portfolio transaction costs.         Direct the SEC to clarify the definition of “no-load” funds to ensure that investors are not being misled.         Require new recordkeeping of soft dollar transactions.         Call on the SEC to study the recent increase in arbitration cases involving mutual funds.**(c) Enhance corporate governance and management integrity, strengthen director oversight:**The Bill builds on the Sarbanes-Oxley Act by furthering the independence and accountability of mutual fund directors. Provisions included in the Bill would:         Require two-thirds of all board directors to be independent.          Strengthen the definition of an independent director by authorizing the SEC to issue rules to exclude from that definition persons with business or close family relationships with the fund company.         Require that directors be informed of any significant deficiencies in the operation of a mutual fund discovered in a SEC inspection.         Require independent directors to certify that they have reviewed and approved portfolio manager compensation, and certify that procedures are in place for valuation, oversight of fund flows, provision of breakpoint discounts, establishment of appropriate classes of shares, enforcement of codes of ethics, and oversight of internal compliance.         Require fund advisers to submit an annual report to directors on revenue sharing, directed brokerage and soft-dollar arrangements and impose a fiduciary obligation on fund directors to review such arrangements and ensure that they are in the best interests of the fund.         Require additional recordkeeping requirements for soft-dollar arrangements as well as a SEC study on their use by investment advisers.         Require each fund to have a chief compliance officer who will report directly to the independent directors, as well as whistleblower protections and internal compliance procedures.**(d) Address recently revealed fraudulent trading practices:** To protect mutual fund shareholders from trading practices that may disadvantage long-term investors, the Bill also includes provisions to eliminate conflicts of interest in portfolio management, ban short-term trading by insiders, allow higher fees to discourage short-term trading, encourage fair value pricing, and strengthen funds’ compliance with rules. These provisions would:         Prohibit the joint management by the same person(s) of mutual funds and hedge funds. The ability of firms to provide advisory services to both kinds of funds, however, would not be limited.          Prohibit insiders from short-term trading of their own fund shares.          Allow funds to charge higher than the current limit of two percent for redemption fees in order to discourage short-term trading that harms long-term investors.         Require the SEC to issue clearer rules that encourage fair value pricing, thereby eliminating the stale pricing that makes market-timing profitable.         Extend existing regulations governing trading by insiders in the underlying securities owned by mutual funds to trading in fund shares. To ensure a full trading day, investors could place orders up to but not after 4 p.m. In some cases, this means intermediaries could place trades with funds after the close; however, strict monitoring and an audit trail would be required to ensure that the 4 p.m. closing system is not being gamed. In this manner, those in the western parts of the United States and pension funds or other investors using intermediaries would not be disadvantaged. Investors would also be assured of receiving same-day execution of orders.**(e) Apply audit committee reforms to mutual funds:**The Bill would also require all mutual funds to abide by the same audit committee standards required of exchange-listed companies under the Sarbanes-Oxley Act, which ensures strengthened auditor independence and accountability.**1.6 Calvert survey on corporate responsibility and investor confidence**Released on 18 November 2003, the Calvert study seeks to examine the public’s concern about unethical business practices among potential investments and their interest in mutual funds that consider ethics when making investments. The following is extracted from the executive summary of the study. **(a) Investors have become less trusting of corporate management over the last 2 years**         The large majority of investors (77%) have become less confident in the trustworthiness of corporate management.          Confidence in management trustworthiness has eroded among more people than has confidence in other important areas such as the safety of financial markets (with 59% less confident), mutual fund integrity (45%), and the ability to reach one’s retirement goals (41%). **(b) Investors’ interest in knowing more about the companies they are investing in has increased over the last 2 years**         The large majority of investors (79%) have become more interested in how corporations are governed.          They are more likely to seek financial and accounting information about their investments (68%)**(c) Investors want to invest in companies they perceive as ethical**         Most investors (84%) would be more likely to invest in a mutual fund if they knew one of its principles was to invest in companies that engage in ethical business practices in terms of operations and reporting.          A focus on ethical business practices is a great motivator for investment with a mutual fund than other important issues, including the principals of selecting companies that do not harm the environment (77%), are not involved in sweatshop labour (72%), have a good record of hiring and promoting women (65%) or minorities (55%), are not involved in tobacco (51%), nor manufacturing guns (40%). **(d) And, most believe that doing so will be associated with less investment risk and better returns**         71% of investors agree that companies that operate with higher levels of integrity carry less investment risk.          67% believe that these companies deliver better investment returns. **(e) Investors feel they are ill-equipped to identify companies that are engaged in unethical business practices**         78% say that they are only a little or not at all equipped to identify companies that are engaged in unethical business practices; 23% believe they are fairly or very well-equipped. **(f) Investors think it is essential or very important that socially responsible mutual funds require companies to be open and honest in reporting of finances and environmental liabilities.**          To encourage ethical business practices, the vast majority of investors think it is essential or very important that mutual funds require companies to be open and honest when it comes to: financial reporting (94%), and environmental liabilities (81%)         Most investors also think it is essential or very important that socially responsible mutual funds require:o        Independence in the Board of Directors (76%);o        Reasonable executive compensation (66%)o        Encouragement of shareholder voting on key issues (66%)o        Diversity in the Board of Directors (63%). Details of the survey are available on the [Calvert](http://www.calvertgroup.com/%22%20%5Ct%20%22_new) website. **1.7 European Commission proposes Directive on cross-border mergers**On 18 November 2003, the European Commission presented a proposal for a Directive to make cross-border mergers easier, by overcoming obstacles caused by different national laws. It would make such mergers simpler for all companies with share capital. However, it would be especially useful for small and medium-sized businesses that want to operate in more than one Member State, but not throughout Europe, and thus are not likely to seek incorporation under the European Company Statute. The proposed Directive would set up a cross-border merger procedure whereby mergers would be governed in each Member State by the principles and rules applicable to "domestic" mergers. The proposed Directive would fill an important gap in company law and is the first measure to be presented under the Commission's Action Plan on company law and corporate governance in the European Union, published in May 2003 (see IP/03/716 and MEMO/03/112). The proposal for a Directive will be submitted for adoption under the so-called 'co-decision' procedure to the EU's Council of Ministers (subject to qualified majority voting) and the European Parliament. As EU law now stands, cross-border mergers are possible only if the companies wishing to merge are established in certain Member States. In other Member States, the differences between the national laws applicable are such that companies wanting to merge have to resort to complex and costly legal arrangements. These arrangements often complicate the operation and are not always implemented transparently and with legal certainty. Moreover, they usually result in the acquired companies being wound up, which can be a very expensive operation. The present proposal, which covers all companies with share capital, both public limited liability companies and others, aims to make cross-border mergers possible and easy all over the European Union by approximating the cross-border merger procedure to the procedures used for "domestic mergers" between companies governed by the laws of the same Member State. In other words, each company taking part in a cross-border merger would, under the Directive as proposed, do so in accordance with the laws of its own Member State (except in specific cases provided for in the Directive related to the cross-border nature of the merger). Operators are already familiar with these national procedures through use. Protection is afforded under national laws, and would thus be maintained by the proposed Directive, for creditors, debenture holders, the holders of securities other than shares, minority shareholders and employees. In the specific case of employees' rights, the general principle of the national law of the company created by the merger applies. If there were no employee participation, this would continue to be the case and if the merged company were created in a Member State with rules on employee participation, it would be governed by those rules. However, if at least one of the companies taking part in the cross-border merger were governed by rules on employee participation in its home Member State and if the merged company were to be created under the rules of a Member State where such rules do not apply, then a negotiation procedure, as provided for under the European Company Statute, would apply (Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European Company and the accompanying Council Directive 2001/86/EC of 8 October 2001). This procedure would allow for interested parties to define an agreed participation regime on employee participation. It would only be where interested parties failed to reach agreement that, as a fall-back, the pre-existing co-determination regime would be extended. In a situation where two companies merged and both operated under a compulsory co-determination regime, they could choose to incorporate in a Member State which has a compulsory regime but which is not equivalent to the most stringent co-determination regime, without having to enter into negotiations as foreseen in the European Company Statute. The full text of the proposal is available on the [Europa](http://europa.eu.int/comm/internal_market/en/company/company/news/index.htm%22%20%5Ct%20%22_new) website: A complementary proposal to update, clarify and broaden the scope of the European Community's Directive that provides for tax deferral in the case of cross-border mergers and divisions of companies, transfers of assets and exchanges of shares (90/434/EEC) was presented recently by the Commission (see IP/03/1418). **1.8 Centre for Corporate Law and Securities Regulation releases Prospectus Survey report**In November 2003, the Centre for Corporate Law and Securities Regulation, The University of Melbourne released the report “Use of Prospectuses by Investors and Professional Adviser”. The research report contains the results of two surveys of recipients of prospectuses: investors and their professional advisers. The objective of the surveys was to obtain information on how prospectuses are used and obtain views on the utility of prospectuses.The distribution of the surveys was as follows:         4,000 surveys were distributed to individual investors who are members of the Australian Shareholders Association with 891 returned (22.3%)         2,000 surveys were distributed to professional investment advisers with 171 returned (8.6%)(a) Summary – Investor Survey**(i) Background information**                891 responses were received.                Respondents range from a student with $2000 in managed funds, to a retiree with over $15 million invested directly in shares and $1 million in managed funds to benchmark his own investment decisions.                76% of respondents are aged over 55 years.                81% are male.                56% are retired and 27% are in a professional occupation.                The range of annual household income is fairly evenly spread above $30,000, with 24% having an income between $50,000 and $74,999 per annum.                 Respondents have a total of $101,923,500 invested in shares through managed funds, and $605,018,250 invested directly in shares.**(ii) Shares owned directly**                Half of the respondents own shares in less than 20 companies each, but all have diversified investments.                The industry most heavily invested in is banking and finance, followed by resources and mining, then retail.                 60% of respondents use a stock broker who provides an advisory service, but only 27% have a financial planner.               The most popular source of information before making an investment decision is the newspaper, followed by prospectuses. However, when investors are asked about sources of information for their most recent investment decision, the prospectus falls to fourth position, after newspapers, investment magazines and brokers.               76% of respondents check share performance at least weekly (44% daily), mainly in newspapers or on the internet.               80% of respondents trade shares at least annually, the majority of those, at least quarterly.               82% receive an annual report for each company in which they own shares, and the majority spend less than 1 hour reading them. Those who do not receive or read annual reports regard them as too long, too detailed, containing out of date information and not an effective use of resources. Respondents who do read the reports are primarily interested in performance projections, followed by details about the executive team and management, and returns.               Over half of the respondents spent between 30 minutes and an hour reading the prospectus for their most recent investment. Those who did not read it were deterred by its complexity. Those who did read it were primarily interested in performance projections, followed by details about the executive team and management, and returns.                Respondents were ambivalent about their confidence in the content of prospectuses, and the importance of a prospectus in comparison with other sources of information in making an investment decision, ranking both in the mid range between not at all important, and extremely important.**(iii) Managed investment fund prospectuses**                460 respondents completed this section. 23% have money in only one managed fund.                23% of respondents have money invested in an international equity fund, 22% invest in Australian industrial equity funds and 20% invest in Australian diversified equity. 14% invest in combined Australian and international industrial equity funds. 1% of respondents are not sure what type of fund they invest in. 11% invest in property trusts.                The need for diversification scored highest when respondents were asked for their main reasons for investing in managed funds, followed closely by capital growth.                45% of respondents learnt about the funds in which they invested through the media. 40% learnt about them through their financial adviser and 14% through friends or family.                All of the respondents who completed this section of the survey own shares directly as well as investing in managed funds. The primary reason for combining the two is diversification.                 57% of respondents sought professional advice before investing in a managed fund, the majority from an investment adviser. After professional advice, prospectuses, newspapers and investment magazines are the most used sources of information about managed funds. For information about their most recent investment, most respondents cited newspapers and investment magazines, just ahead of advisers and prospectuses, as the main sources.                Respondents were fairly evenly divided between yes and no when it came to knowing the asset allocation of their managed fund investments.                Most respondents have never withdrawn money from their managed fund investments, or switched between managed funds.                94% receive the annual report of their managed fund, and most spend 30 minutes or less reading it, looking mainly for information about performance. Most of those who do not read it find it too long and boring.                When respondents received the prospectus for their most recent managed funds investment, most spent 1 hour or less reading it. Of those who did not read it, most said it was because their investment decision was already made. Those who did read it were looking for information about performance, the executive team, the investment strategy and the asset allocation.                Most respondents were ambivalent about the importance of the prospectus in making their investment decision.**(iv) General results on prospectuses**                Only 36% of respondents said that the prospectus gives them sufficient information to make an investment decision. 52% still feel the need to seek professional advice after reading the prospectus.                56% of respondents think that, as a general rule, prospectuses are not easy to understand. They have most difficulty with legal or technical jargon. They also find prospectuses too detailed and repetitive and also have difficulty with the section dealing with financial matters. 66% of respondents think that prospectuses are too long.                51% of respondents find prospectuses for shares easier to understand than those for managed funds. 39% find those for managed funds easier to understand, and 10% thought that there was no difference.                52% of respondents do not find it easy to find the information they want in a prospectus. Suggested improvements are to summarise key points, simplify and clarify the contents, use less jargon, and make the prospectus more concise.                 81% of respondents would apply for shares if the government were to privatise a profitable business, although 181 of these respondents gave a qualified yes, depending on factors such as the price, type of business, or their investment needs at the time. Most feel that the business would be more profitable after privatisation, particularly if it has a monopoly, and cite the success of previous similar floats. 115 respondents believe that the government always sells such businesses under value, for political gain. Along similar lines, the investment is seen as low risk because of confidence that the government would not risk political backlash by “selling a lemon”. Many respondents also express a desire to keep such businesses in the hands of Australians. (b) Summary – Professional Adviser Survey**(i) Background information**         171 responses were received.         The majority (80%) of respondents considered themselves independent advisers as defined in ASIC Policy Statement 116.         Client bases consist mainly of less well-informed investors, including a large number of retirees.         Investment in shares is recommended primarily to spread risk, although investment through managed funds was the preferred option. Many advisers put clients into direct share investment only at the client’s request, and on the understanding that the client will monitor the investment. Investment in managed funds is perceived as providing more diversification, less risk and a better sector spread. Investment in managed funds is also recommended in order to utilise fund manager expertise.          Most respondents work from dealer group recommended lists. Only 27% of respondents conduct their own research and analysis of companies.          For those respondents who conduct their own research, the most important sources of information are analysts’ reports and prospectuses, followed by company annual reports, the internet and management presentations. **(ii) General results on prospectuses**         85% of respondents found that clients have difficulty understanding prospectuses, finding them too long, too detailed, and too full of legal or technical jargon.         Most responses indicated that clients don’t want to read, or can’t understand, a prospectus, and rely on their adviser to describe and interpret the investment.         Clients have more questions about fees and charges than any other aspect of the prospectus.         The majority of respondents stated that the role of the prospectus in the process of providing advice to clients is either “very little”, a legal formality, an application form, a sales tool, or at most, a backup to the adviser.         72% of respondents believe that clients do not fully understand risks associated with certain investments, at least until the adviser explains the risks.         83% believe that simpler prospectuses would be beneficial and 89% regard it as part of their role to explain prospectuses to investors. 73% believe that simpler prospectuses would make their task easier although 94% said that simpler prospectuses would not make their role less important.         Most respondents to this question believe that it would be more cost effective to convey information currently contained in prospectuses through the internet, although many also suggested “less gloss” and longer life for prospectuses. Other suggestions included separate documents for advisers and investors.         75% think that the level of disclosure on the part of companies and fund managers is sufficient to provide informed investment advice.**(iii) Share prospectuses**         19 respondents did not complete this section, saying they are unlicensed to offer advice on direct share investments.         Risk factors, the company’s dividend policy, the company’s liabilities and the company’s operations and business are seen as the most useful information in providing investment advice to clients.         Prospectuses most successfully convey information on a company’s directors and management, its industry, its operations and business, and how to apply for shares.         65% of respondents do not believe that any topics can be omitted from a prospectus without affecting the quality of advice to clients, although there were a number of suggestions regarding format – in particular, that there should be a standard format so that investors can find and compare information quickly.         Most respondents stated that share prospectuses held too much information. 80% of advisers said that the information contained in them is set out in a manner that makes it incomprehensible to clients. However, 79% said that the information is set out in a manner that makes it comprehensible to investment advisers.          Suggestions to improve comprehension included summaries, less jargon, more graphics and standard formats.         Overall, there is no essential information currently not being included in prospectuses. However, most respondents felt that prospectuses should include information on strategic goals, market share and product development and quality. **(iv) Managed investment fund prospectuses**         Clients most frequently ask about fees and charges relating to funds (31%) followed by performance history (18%), risk (13%) and what the funds invest in (12%) A total of 17% either ask if they need to read the prospectus, ask the adviser to interpret the prospectus or rely solely on the adviser’s recommendation.         Only 2% of respondents said clients found share prospectuses easier to understand than those of managed funds, while 43% answered “neither”.         Asset allocation, risk and tax implications are regarded as the most important topics in providing advice to clients. However, prospectuses are most successful at conveying information on past performance.         64% of respondents said that managed funds prospectuses provide all information required to provide advice to clients.          Assessment of the appropriateness of the amount of information contained in prospectuses varied among respondents. Overall, they contained either too much (45%) or the right amount (45%), with only 10% of respondents believing that they had too little.         Most of the problems of prospectus content related to the length and detail of the document, and its format.The full report is available from the [Centre for Corporate Law and Securities Regulation](http://cclsr.law.unimelb.edu.au/%22%20%5Ct%20%22_new) website. **1.9 Centre for Corporate Law and Securities Regulation releases ASIC Enforcement report****(a) Overview of research report**         This research report reports the findings of an empirical study of court-based enforcement activities undertaken by the Australian Securities and Investments Commission ("ASIC").          This research builds on a 1999 empirical study by members of the Centre for Corporate Law and Securities of how ASIC used civil penalties as enforcement tools against company directors.         The current research project has two aims:         To produce a detailed study of ASIC's enforcement activities and to identify patterns in those activities;         To determine whether ASIC enforcement activities are consistent with the findings of past sociological studies of legal regulation and enforcement. Sociological theories contend that the effectiveness of laws as forms of regulation depends on the process by which those laws are received, interpreted and responded to by the participants in the regulatory process. Those participants include ASIC, the Commonwealth Director of Public Prosecutions, and the pool of persons and companies influenced and controlled by company and financial services laws. **(b) Research Methodology**         The project involves an empirical study of AISC court-based enforcement activities over the period January 1997 to December 1999.          The dataset was generated in collaboration with ASIC, comprising information regarding all ASIC court-based enforcement activities during the sample period. Information was also obtained from the Commonwealth Director of Public Prosecutions ("DPP") detailing enforcement activities referred to the DPP by ASIC during the sample period. The amalgamation of data from various sources has enabled the creation of a unique dataset with a high degree of detail.**(c) Key findings of the study**         The empirical study analyses three aspects of ASIC court-based enforcement activities during the sample period:o        The characteristics of the participants in the regulatory process, apart from ASIC and the DPP;o        The types of enforcement activity undertaken by ASIC and the legislation applied in those activities;o        The outcomes of ASIC enforcement activities.**(i) Characteristics of regulatees**The study found that ASIC was more likely to pursue court-based enforcement:         against individuals (rather than companies);         against men (rather than women) aged between 41-50 years in their capacity as directors of companies working in the finance and insurance industry; and         in relation to private companies rather than public companies and, in particular, private companies that were no longer a going concern.**(ii) Types of enforcement activity**The study found that ASIC was more likely to pursue penal enforcement in relation to:         laws that were mandatory (rather than enabling) in nature;         laws that were oriented towards social, rather than economic, regulation. In particular, the external administration and misconduct provisions of the Corporations Law, rather than the disclosure provisions; and         laws with an ethical foundation that address conduct that is widely condemned because it exploits and defrauds shareholders and creditors.**(iii) Enforcement outcomes**The study found evidence of:         the predominant use of penal enforcement activities by ASIC over civil enforcement activities;         targeted enforcement by ASIC specifically in relation to external administrator assistance actions;         the predominant use of a limited, severe set of penal sanctions (specifically fines and custodial sentences) despite the availability of a much wider range of sanctions;         the predominant use of settlements by ASIC as outcomes for civil enforcement activities; and         ASIC court-based enforcement activity being predominantly in the middle to higher bands of the pyramid of enforcement. **(iv) General conclusions**         The study highlights the predominant use of penal enforcement activities and sanctions within the dataset of ASIC court-based enforcement work.          This finding reflects the traditional conception of the role of court enforcement in legal regulation as a "last resort" strategy.         The study also highlights the reality that the majority of enforcement activities in the dataset concern breaches of mandatory, socially oriented or ethically-based laws by regulatees in circumstances where their behaviour is widely regarded as undesirable.         What the study cannot do is comment on whether any of these trends are predominant in all ASIC enforcement work, or merely court-based enforcement work, the subject of this study. A study of non-court based enforcement activities undertaken by ASIC is required before this would be possible. The full report is available from the [Centre for Corporate Law and Securities Regulation](http://cclsr.law.unimelb.edu.au/%22%20%5Ct%20%22_top) website. **1.10 Survey reveals more US companies report detecting fraud**A KPMG survey of 450 medium to large United States companies published on 1 December 2003 has found that 75% of the companies surveyed reported at least one instance of fraud this year, compared to 62% in 1998. This reflects not so much an increase in the incidence of fraud but increased awareness resulting in uncovering more instances of fraud, said KPMG. Thirty-six percent of the companies reported losses of US$1 million or more from fraud in 2003, compared to 21% in 1998. Theft of assets and expense account fraud more than doubled since 1998, and the number of companies that said they were uncovering financial fraud also doubled from 3% in 1998 to 7% in 2003. About 77% of firms polled had taken steps to detect fraud through internal controls, up from 51% in 1998; while 65% of companies conducted internal audits, up from the previous 43%. Sixty-three percent of fraud cases were uncovered in employee reports, up from 58% five years earlier. Some 43% of corporate and government officials expect fraud cases to decline in the next 12 months, with only 7% anticipating an increase. The survey is available on the [KPMG](http://www.us.kpmg.com/%22%20%5Ct%20%22_new) website.**1.11 Group of 100 releases “Guide to Compliance with ASX Principle 7”**The Group of 100, an association of senior Australian finance executives, has released the “Guide to Compliance with ASX Principle 7: ‘Recognise and Manage Risk’”. The guide, which was prepared for the Group of 100 by Deloitte, is designed to give general guidance in relation to compliance with Principle 7. The guide identifies issues and provides recommendations in the following areas:         formal framework;         breadth of controls;         layers of controls;         level of assurance;         period of coverage;         corporate reach;         operating efficiently and effectively; and         reporting templates.The Guide is available from the [Group of 100](http://www.group100.com.au/%22%20%5Ct%20%22_new) website.**1.12 Study of shareholder resolutions at meetings of US companies**In November 2003, a study of shareholder resolutions and shareholder voting at meetings of US companies was released. The study, by the consulting firm Georgeson Shareholder, covered meetings held during the first seven months of 2003. The key findings of the study are:         Fifty-six percent more governance proposals came to a vote – 427 in 2003, versus 273 for the same period in 2002. This represents the largest increase in years.         Executive compensation dominated the 2003 governance agenda. Nearly 40% of the resolutions dealt with compensation-related matters, with the leading proposal calling for stock options to be expensed on grant date. Sixty-seven such resolutions drew support on average from 45% of votes cast (32% of outstanding shares).         The number of governance proposals achieving support from a majority of votes cast also increased, from 88 proposals in 2002 to 140 in 2003. In terms of raw numbers, this represents a 59% increase. However, measured against the total number of proposals presented, the approval rate is almost unchanged, from 32.2% (88/273) in 2002 to 32.8% (140/427) in 2003.         Proposals seeking shareholder approval for, or rescission of, poison pills topped the list again this year with the highest number of resolutions – 82.          Board declassification continued to attract the highest levels of support – an average of 62% of votes cast and 45% of outstanding shares.         The demographics of shareholder proponents continued to evolve, with sponsorship by special interest groups continuing to dominate the agenda. Labor unions overtook individual shareholders as the leading proponents of governance resolutions, sponsoring nearly half of all resolutions that came to a vote in 2003. Public pension funds’ sponsorship shrank to a low of just 2%, down from 6% of proposals in 2002, and far from the dominant levels of institutional sponsorship that signaled the start of the governance movement in the 1980s.          Surprisingly, the average level of shareholder support for governance proposals in 2003 did not increase. Measured as a percent of votes cast, average shareholder support was 36%, unchanged from 2002. As a percent of outstanding shares, the average favourable vote in 2003 was 26%, also unchanged from 2002.         Binding shareholder proposals continued to languish. Five were presented this year, down from a peak of 13 in 1999.         The impact on shareholder voting of the much-discussed governance ratings was far from clear in 2003. The proliferation and activities of governance raters made headlines during the proxy season, but a correlation between their ratings and voting results, if any, was difficult to assess. A number of commentators remarked that governance scores – high or low – did not seem to affect shareholder support for governance proposals, and cited this as further evidence that institutions tend to make voting decisions narrowly on the merits of the proposal and without regard for a company’s governance fundamentals.The study is on the [Georgeson Shareholder](http://www.georgesonshareholder.com/%22%20%5Ct%20%22_new) website.  |
| **2. Recent ASIC Developments** |
| **2.1 ASIC releases results of the financial reporting surveillance project**On 17 December 2003, the Australian Securities and Investments Commission (ASIC) provided the Stage 1 results of the most recent financial reporting surveillance project initially announced in August 2003 ([Media Release MR 03/242](http://www.asic.gov.au/asic/asic_pub.nsf/byheadline/03-242%2B440%2Blisted%2Bentities%2Bto%2Bbe%2Breviewed%2Bby%2BASIC?openDocument" \t "_new)). 'In the last three months ASIC has reviewed the audited full-year financial reports of about 400 listed companies with balance dates between 30 June and 31 July 2003, for their general compliance with accounting standards', ASIC Chief Accountant, Mr Greg Pound, said. The project also covered more than 1000 listed Australian entities with a 30 June balance date to review: * the compliance with the disclosure obligations of section 300A of the [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) (the Act) relating to the value of options issued as part of the remuneration of directors and senior executives ([Media release MR 03-202](http://www.asic.gov.au/asic/asic_pub.nsf/byheadline/03-202%2BValuing%2Boptions%2Bfor%2Bdirectors%2Band%2Bexecutives%2B?openDocument" \t "_new)), and
* the accounting policy applied by the corporate sponsor to the treatment of actuarial deficits in defined benefit superannuation funds in the financial report of the company ([Media Release MR 03-263](http://www.asic.gov.au/asic/asic_pub.nsf/byheadline/03-263%2BASIC%2Bputs%2Bsuper%2Bsponsors%2Bunder%2Bthe%2Bspotlight%2B?openDocument" \t "_new)).

**(a) Findings****(i)** **Financial reporting surveillance**The review has not identified systemic non-compliance with financial reporting requirements generally or any trends in specific areas. This supports the findings of the earlier 2002 surveillance programme.'We are very pleased that based on our review sample, overall compliance with accounting standards in Australia appears to continue to be high. We believe that the regulatory risk imposed on companies by the ongoing ASIC surveillance programme is important in ensuring that companies give appropriate attention to their financial reporting obligations and that auditors continue to act independently in reporting on whether companies have complied with accounting standards', Mr Pound said.The review however identified 35 companies that have received a qualified audit report. Of those 25 appear to relate to qualifications identifying a breach of an accounting standard.'An audit qualification of this nature is prima facie evidence that the company has not complied with the financial reporting requirements of the Act and warrants regulatory attention', he said.ASIC has written to these companies seeking an explanation as to why they should not in the short term have orders made against them which restrict their ability to use the short form listed company prospectus for future fundraisings. Other compliance action may be contemplated where appropriate.This aspect of the project has also identified a small number of audit reports that do not appear to comply with auditing standards or provide a clear indication as to the basis for the qualification. Further explanation is being sought from the auditor's concerned.'Auditing standards make it clear that an audit report should be expressed in a clear and unambiguous manner, and any qualification should convey information, not merely arouse enquiry. Any deficiency in the audit report itself may lead us to review the audit more broadly', Mr Pound said.In addition, ASIC has not yet been able to conclude a view about a further 27 companies. Inquiries are continuing and it is expected that ASIC will reach a view about these companies' accounts and whether further action should be taken against the company or its auditor in the first quarter of 2004. If, in the meantime, ASIC forms any adverse view of the reliability of these accounts, it will seek corrections and full market disclosure.The issues identified most relate to:          improper acquisition accounting in terms of the value of assets acquired and the value of consideration, and the non-recognition or inappropriate valuation of goodwill          improper revenue recognition          incorrect recognition or measurement of assets         incorrect classifications in the statement of financial performance, for example incorrectly reporting expenses as extraordinary items.Our initial observations from inquiries to date suggest that the need for improved disclosure identified in 2002 remains an issue. 'We are again identifying instances where better disclosure by companies may have avoided ASIC raising a concern about the reliability of a financial report. We reiterate our view that companies should ensure that financial report disclosures are clear and comprehensive. This is a vital component of a high quality financial report and helps to ensure that report readers can fully understand the accounting policies applied and the financial outcomes', Mr Pound said.The accounts for four companies had audit qualifications relating to their continuation as going concerns (six last financial year). ASIC is making enquiries through its National Insolvency Coordination Unit about these companies. Another 161 companies had an 'emphasis of matter' in the audit report (160 last financial year) which related to significant uncertainty about going concern. An 'emphasis of matter' is required under Australian Auditing Standards to draw particular attention to matters disclosed in the notes of a financial report that are of particular importance to the company's future as a going concern.'While an emphasis of matter is not a qualification of the audit report, the fact that the external auditor has determined that it is sufficiently important to draw the matter to the attention of report readers suggests that particular attention should be given to the information provided about going concern when reading the financial report', Mr Pound said.ASIC is also concerned about the level of compliance by companies in relation to the timing of their audited financial reports. Some 73 listed companies with a 30 June balance date failed to lodge their accounts when they were due, without obtaining an extension from ASIC. Eight listed companies failed to lodge their June half-year financial report on time.ASIC has written to these companies asking them why they should not be prohibited from relying on the lower content prospectus regime.In addition, ASIC will be reviewing the financial reports of late lodging companies for compliance with accounting standards.'The fact that a company is late in preparing and lodging its financial report suggests potential reporting problems and indicates that ASIC and investors should carefully scrutinise the company', Mr Pound said.**(ii) Directors' Report – Value of Options**ASIC has issued letters to 74 companies seeking additional information where it appears options have been issued to any of the Directors and the 5 named officers receiving the highest emoluments and the options were not valued as part of that disclosure.Responses to date indicate that many of these instances require no further action, for example because the options had vested prior to, or lapsed during the 2003 financial year.ASIC has agreed that if it is concluded that a company has not complied with section 300A, but agrees to resolve the matter by:          disclosing the value of options through an announcement to the ASX, including advice that options have no value in the rare case where the appropriate application of a suitable valuation methodology indicates that outcome, and          advising shareholders in the next communication to them where ASIC determines that the amount is substantial, no further action will be taken.'The legislation treats disclosure of this information as an important component of directors' reports to shareholders.' ASIC's regulatory response ensures that the information is provided to the market on a timely basis', Mr Pound said.Where ASIC concludes that a company has not complied and does not agree to voluntarily provide the information, a formal enforcement process will be commenced to:          require compliance with section 322 of the Act requiring amendment and re-lodging of an updated director's report, which will require the company to update all aspects of the report to the date of re-lodgement, or          result in an order restricting the company from relying on the lower content prospectus regime for future fundraisings.To date the following companies have resolved the matter by taking the following action:1. Norwest Energy NL – announcement to the ASX.2. Winepros Limited – announcement to the ASX.3. Ebet Limited – lodged an amended Directors' Report.4. Prime Television Limited – lodged an amended Directors' Report.ASIC expects several other companies will be taking similar action in the near future.**(iii) Defined Benefit Superannuation – Reporting by Corporate Sponsors**ASIC has reviewed the financial reports of all listed companies with a 30 June financial year for the disclosures required by Accounting Standard AASB 1028 'Employee Entitlements'. It has identified companies that are corporate sponsors of defined benefit superannuation plans and that have significant deficits in those plans that may represent a liability to the company.Letters have been sent to 19 listed entities seeking additional information to enable ASIC to determine if the correct accounting treatment appears to have been adopted by the company for those deficits in their corporate sponsored defined benefit superannuation funds.**(b) Update – 2002 Surveillance**ASIC also provides a final summary of the 2002 financial reporting surveillance project. Following the April 2003 Stage 2 progress report ([Media release 03/125](http://www.asic.gov.au/asic/asic_pub.nsf/byheadline/03-125%2BASIC%2Breleases%2Bstage%2Btwo%2Bresults%2Bof%2Baccounting%2Bsurveillance%2B?openDocument" \t "_new)), Stage 3 of the 2002/03 surveillance project has been completed. Stage 3 involved the review of 195 companies with balance dates between August 2002 and March 2003.Further enquiries have been made with companies and in some cases auditors to resolve outstanding matters and to address additional cases identified from Stage 3.As a result, the following companies have changed their accounting policies in the areas of concern identified by ASIC:         Flight Centre Limited and Pacific International Limited (now reporting net revenues only from agency transactions rather than the gross value of customer transactions);         National Telecoms Group Limited (revenue recognition for contracts involving multiple deliverables);         Strarch International limited (recognition of revenue and expenses for construction contracts);         ECSI Limited (write-down of non-current assets and goodwill);         Futuris Corporation Limited (write-off of prior period deferred costs); and         Sabina Corporation Limited (asset write-down).In addition, ASIC has asked a number of companies to improve the accounting disclosures in their next financial report. A number of these involve disclosure of policies for the deferral of major cyclical maintenance expenditure.ASIC has also referred the matter of accounting for commodity pooling arrangements to the Urgent Issues Group (UIG), which has agreed to include it on its work programme.'There is a sufficient degree of inconsistent reporting between companies involved in these types of arrangements in different industries and substantial difference of opinion as to the appropriate accounting policies to be applied to warrant the matter being resolved through the UIG process', Mr Pound said.A limited number of matters remain unresolved and ASIC is considering its options in relation to these, including the possibility of litigation.**2.2 ASIC releases final SRI guidelines**On 17 December 2003, the Australian Securities and Investment Commission (ASIC) released its guidelines for the inclusion of information relating to labour standards and environmental, social and ethical factors in the product disclosure statements (PDSs) of investment products. The guidelines have been developed as a result of recent reforms to the [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default), which require investment products to disclose this information in a PDS. Section 1013DA of the Act states that ASIC may develop guidelines, with which a product issuer must comply, where a PDS makes any claim that labour standards or environmental, social or ethical considerations are taken into account in the selection, retention or realisation of the investment.The guidelines have been developed after extensive consultation with stakeholders, following the release of an ASIC discussion paper in December 2002, and draft guidelines in September 2003. The approach taken in the legislation and the guidelines allows product issuers to determine for themselves: * whether or not they have regard to any aspect of these considerations;
* which particular factors they will have regard to; and
* how they will consider them (for example, what methodology they will use in determining environmental standards).

The guidelines state that where labour standards or environmental, social or ethical considerations are taken into account, the PDS must tell consumers which matters are taken into account, and how they are taken into consideration, so that consumers can clearly understand the approach. The PDS must also clearly state where the investment firm does *not* take such matters into account.Product issuers will be required to comply with the guidelines after the expiry of the transition arrangements. This means the guidelines will apply to all PDSs:(a) dated on or after 11 March 2004;(b) given to a person on or after 11 March 2005. The [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) [s1013D (1)(l)] and the regulations to the [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) [7.9.14C] contain an obligation for a PDS to disclose information about labour standards and environmental, social and ethical factors with which all investment product issuers must comply from 11 March 2004. This basic obligation operates before and after the guidelines take effect. ASIC will review these guidelines in 2006.Copies of the guidelines are available from the [ASIC](http://www.asic.gov.au/%22%20%5Ct%20%22_new) website.**2.3 ASIC grants relief in relation to mortgage offset accounts**On 9 December 2003, the Australian Securities and Investments Commission (ASIC) granted conditional relief from the licensing requirements under the [Corporations Act 2001](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) (the Act) to intermediaries and product issuers providing, or advising on, offset accounts as part of a customer's loan package. The relief will only be available to financial services providers that belong to an ASIC-approved external dispute resolution scheme (EDR scheme). Providers that are not currently members of an EDR scheme will have until 11 March 2004 to join an EDR scheme if they wish to continue advising on, or arranging for the provision of offset accounts. Generally, offset accounts are a separate deposit facility and not part of the loan product itself. As such, they are considered to be 'financial products'. Therefore, any advice or dealing activities in relation to offset accounts would normally require an Australian financial services licence (AFSL). However, offset accounts are integrally linked to home loans and other loan products, which are excluded from the licensing regime. These accounts are generally perceived by consumers to be a feature of these loans. ASIC therefore considers relief to be appropriate in view of this link.Home loans and other loan or credit products are not regulated by ASIC under the financial services licensing regime. Instead, consumer credit products and finance brokers, who commonly offer these products, have for many years, been subject to sector-specific regulation by the States and Territories. ASIC notes that this relief is restricted to mortgage offset accounts, so that intermediaries who wish to advise on, or arrange for the provision of, other regulated products when providing credit facilities will still need to obtain an AFSL or be an authorised representative of a licensee. For example, providing advice on insurance products or other deposit products will still attract the licensing requirements. ASIC also notes that while credit is not part of the licensing regime under the Act, it is covered by the consumer protection provisions of the [Australian Securities and Investments Commission Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56481" \t "default) (ASIC Act). ASIC can take enforcement action if an entity misleads consumers when providing credit and other financial products regulated under the ASIC Act. The provider does not have to hold an AFSL for ASIC to take such action. ASIC will review this area of the credit market to assess the impact of this exemption over time.**Background**Lenders commonly offer loans with a 'mortgage offset' account as part of their range of home loan products. Other loans, apart from home loans, may also be packaged with an offset facility. Generally, under these arrangements, the borrower deposits money (for instance, wages or salary) into the account. Either:          the amounts deposited are notionally offset, either fully or in part, against the balance of the borrower's loan account, so the borrower pays interest on the reduced balance only; or          interest on the loan account is periodically reduced by an amount that would otherwise accrue as interest on the offset account. Usually, the credit balance on the offset account is available to the borrower at call.**2.4 Southcorp settles with ASIC over market disclosure**On 27 November 2003, Mr David Knott, Chairman of the Australian Securities and Investments Commission (ASIC), announced that orders had been made in the Federal Court of Australia settling ASIC’s civil penalty proceedings against Southcorp Limited (Southcorp).Under the settlement, Southcorp has consented to a declaration being made that it has contravened the market disclosure provisions of the [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default). Mr Justice Lindgren of the Federal Court ordered that Southcorp pay a pecuniary penalty of $100,000 plus ASIC’s costs.‘The court orders provide an effective and strong regulatory outcome in an area that ASIC has highlighted over the past four years’, Mr Knott said.‘The selective release of information to analysts has the capacity to undermine broad- based retail investor confidence in the fairness of the market. Companies should generally ensure that relevant information is provided to the whole market at the same time.’‘Southcorp’s decision to settle with ASIC on the basis of today’s orders has resulted in a significant saving of taxpayer resources that would otherwise have been required to fully litigate this matter’, Mr Knott said.**Background**On 18 April 2002, Southcorp’s then Executive General Manager of Corporate Affairs, Mr Glen Cunningham, sent an email to selected analysts containing information about the likely impact of the poor 2000 vintage for premium wines on Southcorp’s 2003 gross profit.After the email was sent to the analysts on 18 April 2002, until the close of trading at 1.07pm on the following day, there was a drop in the share price of 7 per cent and the volume of shares traded was five times the average daily traded volume in the previous two weeks.The matter was investigated by ASIC following a referral by the Australian StockExchange (ASX). ASIC alleged that the information should have been disclosed to the ASX under its Listing Rules and in accordance with the [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default), rather than to selected analysts.In its statement of claim filed in the Federal Court of Australia on 26 February 2003, ASIC sought a declaration that Southcorp had contravened the continuous disclosure provisions of the [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default). Under section 1317E of the [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default), the Court has power to make a declaration that the continuous disclosure provisions of the Act have been breached. If a declaration is made, the Court may impose a pecuniary penalty of up to $200,000. These provisions took effect on 11 March 2002.This brings an end to the proceedings, which were set down for hearing in the Federal Court of Australia from 1 to 5 December 2003.Further details about the Federal Court judgment are in Item 4.2 of this Bulletin. |
| **3. Recent ASX Developments** |
| 3.1 Guidance note on market makingOn 28 November 2003 ASX released a guidance note on Warrant market making (ASX Business Rule 8.4.2). The guidance note sets out an explanation of the rule, when the obligation to make markets applies and exceptions to the obligation.3.2 Listing rule amendments - Capital Raising Mechanisms in a Disclosure-based Market – SubmissionsDue to overwhelming interest, the closing date for submissions on the current Exposure Draft - Capital Raising Mechanisms in a Disclosure-based Market was extended until Friday 5 December 2003. The Exposure Draft is available on the ASX website at the following link: [http://www.asx.com.au/about/l3/ProposedListingRuleAmendments\_AA3.shtm](http://www.asx.com.au/about/l3/ProposedListingRuleAmendments_AA3.shtm%22%20%5Ct%20%22_new)**3.3 ASX Market Reforms - Enhancing the Liquidity of the Australian Equity Market**ASX has released a market consultation paper which outlines proposals to change certain aspects of the microstructure of ASX's cash equity market.The most significant change proposed relates to the dissemination of broker identifiers. Currently, broker identifiers are only visible to ASX Participating Organisations (eg Brokers). ASX is proposing to implement changes to its equity market design such that investors and brokers will have equal access to broker identification details.The market consultation paper and a separate Supplement - Request for Comment containing the list of questions for which ASX is seeking feedback are available on the ASX website at the following link: [http://www.asx.com.au/about/l3/MarketStructuralReforms\_AA3.shtm](http://www.asx.com.au/about/l3/MarketStructuralReforms_AA3.shtm%22%20%5Ct%20%22_new)**3.4 Corporate Governance Council – Principles of Good Corporate Governance and Best Practice Recommendations. Corporate Governance Principle 7 - 'Recognise and Manage Risk'**Principle 7 of the ASX Corporate Governance Council Principles of Good Corporate Governance & Best Practice Recommendations provides guidance for the certification of internal risk management and control frameworks.To assist listed entities in implementing these recommendations, the ASX Corporate Governance Council has provided supplementary guidance to its interpretation. The guidance is available on the ASX website at the following link: [http://www.asx.com.au/](http://www.asx.com.au/%22%20%5Ct%20%22_new)3.5 Corporate Governance Council – Implementation Review GroupThe Implementation Review Group (IRG), a high-level industry body charged with the review of the implementation and uptake of the ASX Corporate Governance Council’s Principles of Good Corporate Governance & Best Practice Recommendations(Principles), met in November to review feedback and analysis presented to the group from a broad range of sources. The IRG finds that the articulation of the Principles has been generally well received. Early feedback suggests that companies using the Principles to trigger discussion and engage in internal governance review have seen it as making a positive contribution to corporate practice. The IRG will be making recommendations to the Council in the first quarter of next year, once initial analysis of feedback is complete. The group thanks those who have already provided valuable feedback and welcomes further contribution. Comments should be provided in writing to the IRG Secretariat.c/o Tanya DaveyAustralian Stock ExchangeTel: (02) 9227 0989Fax: (02) 9227 0436Email: tanya.davey@asx.com.au |
| **4. Recent Corporate Law Decisions** |
| **4.1 Disqualification from managing corporations: relevant considerations** (By Amelia Tooher, Blake Dawson Waldron)Australian Securities and Investments Commission v Starnex Securities Pty Ltd [2003] FCA 1375, Federal Court of Australia, Finkelstein J, 28 November 2003The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/federal/2003/november/2003fca1375.](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2003/november/2003fca1375.htm%22%20%5Ct%20%22_new)[htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2003/november/2003fca1375.htm) or[http://cclsr.law.unimelb.edu.au/judgments/](http://cclsr.law.unimelb.edu.au/judgments/%22%20%5Ct%20%22_new)**(a) Summary**This case concerned an application by the Australian Securities and Investments Commission ("ASIC") for the disqualification of a director under section 206E of the [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default). The Court considered what factors are relevant to the application of section 206E.**(b) Facts** The fifth defendant, Emanuele Camiolo, was a director of Icorp Technologies Ltd, Contech Australia Ltd, Starnex Capital Ltd and Starnex Securities Pty Ltd ("Starnex Securities"). Starnex Securities acted as a broker and arranged loans for its clients. The other companies did not actively conduct any business. Following a complaint from a client of Starnex Securities, the companies were investigated by ASIC.**(i) ASIC's investigation**The Court found that ASIC's investigation of the companies revealed several matters of concern. The investigation uncovered that:          the companies were insolvent;          in relation to Starnex Securities, thousands of dollars had been withheld from clients who had requested the company to procure a loan, but when the loan was not forthcoming, were not repaid their commitment fee;         Starnex Securities had advertised that it would arrange commercial mortgage for "no brokerage fees" only to charge them under a different guise;         both Mr Camiolo and Starnex Securities may have engaged in misleading and deceptive conduct in contravention of sections 12DA(1) and 12DB(1) of the [ASIC Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56481" \t "default); and          the companies had committed many offences under the [ASIC Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56481" \t "default). These included appointing directors without consents, failing to appoint an auditor within the required time, failing to send annual reports to members and non-compliance with numerous other reporting and notification requirements.ASIC applied to have Mr Carmiolo disqualified from managing corporations for a period of two years.**(ii) Section 206E of the [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default)** Section 206E provides that the Court, on application by ASIC, may disqualify a person from managing corporations if:          the person has at least twice been an officer of a corporation that has contravened the Act while they were an officer and, on each occasion, they failed to take reasonable steps to prevent the contravention; or         the person has contravened the Act while they were an officer of the corporation; or          the person has been an officer of a corporation and has done something which would contravene sections 180(1) or 181; and         the disqualification is justified.**(c) Decision****(i) Considerations in relation to disqualification**Finkelstein J referred to the comments of Anderson J in Re Gold Cost Holdings Pty Ltd (in liq) Australian Securities and Investments Commission v Papotto (2000) 35 ACSR 107, 111. In this case Anderson J held that the factors governing the Court's powers of disqualification are:"the character of the offender, nature of the breaches, structure of the company and nature of its business, interests of shareholders, creditors and employees, risks to others from continuation of offenders as company directors, honesty and competence of the offender, hardship to the offender and his personal and commercial interests, and the offender's appreciation that future breaches could result in future proceedings...".The Court in HIH Insurance Ltd (in prov liq); Australian Securities and Investments Commission v Adler (2002) 42 ACSR 80, 96-99, held that it is also necessary to consider whether:          a disqualification order is needed to protect the public;          the disqualification order will adversely affect the interests of shareholders, creditors or employees; and          the director is conducting the company's affairs to secure his own interests at the expenses of the interests of others.On the facts before the Court, his Honour held that it was in the public interest that Mr Camiolo be disqualified from the management of any company. Mr Camiolo had failed to act responsibly as a director of the companies. Further, Finkelstein J commented that Mr Carmiolo "appear[ed] to have little or no knowledge of how a company should be managed. He certainly ha[d] little appreciation of the legal obligations imposed on a corporation in relation to its administration and record keeping." Accordingly, his Honour ordered that Mr Carmiolo be disqualified for a period of two years.**(ii) Disqualification must be "justified"**This issue arose because ASIC and Mr Carmiolo had initially asked that a disqualification order be made by consent. Finkelstein J commented that section 206E(1)(b), which requires the Court to be satisfied that the disqualification is justified, cannot be satisfied simply because the parties agree to that course. Finkelstein J referred to Re One.Tel Ltd (in liq); ASIC v Rich (2003) 44 ACSR 682 where it was held that the Court must consider the facts itself and can only make an order when satisfied, in all the circumstances, that the order should be made.**4.2 $100,000 penalty for continuous disclosure contravention** (by Sarah Sheppard) Australian Securities and Investments Commission v Southcorp Limited (No 2) [2003] FCA 1369, Federal Court of Australia, Lindgren J, 27 November 2003The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/federal/2003/november/2003fca1369.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2003/november/2003fca1369.htm%22%20%5Ct%20%22_new) or[http://cclsr.law.unimelb.edu.au/judgments/](http://cclsr.law.unimelb.edu.au/judgments/%22%20%5Ct%20%22_new)**(a) Summary**In this case Lindgren J imposed a penalty of $100,000 on Southcorp Ltd ("Southcorp") for breaching the continuous disclosure requirements of the [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default). This is the first time that a court has imposed a civil penalty for a continuous disclosure contravention. Southcorp had admitted the contravention and, jointly with ASIC, put before the court a Statement of Agreed Facts. The parties agreed to suggest, for the Court's consideration, a penalty of $100,000.**(b) Facts**On 18 April 2002 at 4.29 pm Southcorp's Executive General Manager of Corporate Affairs, Glen Cunningham, disclosed by email to 11 analysts the following information (the "Information"):*          that all of Southcorp's 2000 vintage super premium wines were expected to be sold in the 2003 financial year; and         that the gross profit impact of the poor 2000 vintage on the 2003 financial year compared to the 2002 financial year was expected to be of the order of $30 million.

This information had not previously been released to the market.* The last trade during normal trading in Southcorp's shares before the email was sent was at $6.27 per share. Between the close of trading on ASX on 18 April 2002 and 10.12 am on 19 April 2002 there was a 5% fall in Southcorp's share price. At 1.07 pm ASX halted trading in Southcorp securities at the request of Southcorp. Between the close of trading on ASX on 18 April 2002 and the Trading Halt, the price of Southcorp shares fell by 7%. At 5.36 pm, Southcorp made an ASX profit clarification announcement to the market.
* ASIC subsequently commenced civil penalty proceedings against Southcorp, alleging that the disclosure to the analysts contravened the continuous disclosure rules.
* Southcorp admitted that its conduct gave rise to a contravention of the continuous disclosure requirements in 674(2) of the [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default). The section is a 'civil penalty provision'. In accordance with subsection 1317E(1) if a court is satisfied that a person has contravened such a provision it must make a declaration of contravention. Subsection 1317G(1) allows the court to impose a pecuniary penalty of up to $200,000 where a declaration of contravention has been made and certain other conditions are satisfied. ASIC and Southcorp agreed that these conditions had been satisfied and jointly submitted that an appropriate penalty would be $100,000.
* The parties also agreed that, before the release of the Information to the analysts, Southcorp did not have an obligation to disclose the Information because it was covered by an exception referred to in ASX Listing Rule 3.1. However, by sending the email, Southcorp communicated the Information selectively to the analysts, without first disclosing it to the entire market by notifying the ASX, thereby contravening section 674(2).

**(c) Decision*** As Southcorp admitted the contravention, the issue for Lindgren J was to determine whether the jointly submitted penalty of $100,000.00 was appropriate in all the circumstances of the case.
* **(i) Considerations against Southcorp**
* Lindgren J stated that contravention of the continuous disclosure requirements is serious and not acceptable.
* Despite the fall in the market value of Southcorp's shares, Lindgren J was not satisfied that the fall resulted from the disclosure to the 11 analysts. Even so, he found that the fall in market price was relevant because it could incite speculation that the fall was caused by the selective disclosure of the Information. Lindgren J considered that these types of events generate confusion and a loss of faith in the market.
* **(ii) Considerations in favour of Southcorp**
* Lindgren J took into consideration a number of matters in Southcorp's favour:
*          There was no suggestion that Mr Cunningham had a fraudulent intent or other unworthy motive.         After the events surrounding the email, Southcorp took comprehensive steps to implement a new disclosure regime. This leant in Southcorp's favour on the question of penalty.         Southcorp's admission had obviated the need for lengthy, complex and costly litigation.         There was no suggestion that any officer or member of staff of Southcorp other than Mr Cunningham was involved in the contravention.         The immediacy of Southcorp's action: Southcorp requested a trading halt following the publication of the email and made an ASX profit clarification announcement later that afternoon.         Further contravention by Southcorp was unlikely. Mr Cunningham was no longer employed by Southcorp and Southcorp had updated its continuous disclosure policy and procedures.

Lindgren J held that he was required to imposed the penalty of $100,000 suggested by ASIC and Southcorp if, on the agreed facts, and having regard to all the relevant matters, he could accept the amount as "appropriate", even if he would not have arrived at precisely the same amount.In light of the above-mentioned considerations, Lindren J accepted the suggested penalty of $100,000 and ordered Southcorp to pay ASIC's costs.Lindgren J indicated that, in future cases where a penalty was jointly submitted by the parties, the parties might reasonably be expected to supply to the Court, in support of the penalty suggested, details of penalties which had been imposed in relevantly similar cases and of the circumstances of those cases.(d) Implications of CLERP 9 draft legislation on continuous disclosure contravention* In order to impose the $100,000 penalty on Southcorp there was a need for a court declaration of contravention pursuant to section 1317E of the Act. CLERP 9 proposes to give ASIC the ability to hold hearings into suspected breaches of the continuous disclosure requirements, and to issue infringement notices and impose penalties if it determines that a minor contravention of the requirements has occurred.
* While such changes would save court time and expense, compliance with an infringement notice would deny companies the opportunity of putting their version of events before the court. Another impact would be to give ASIC the combined role of investigating alleged contraventions and then holding a hearing into whether a contravention has actually occurred. At another level, centralising the process in the hands of ASIC has the potential to restrict the remedial recommendations in terms of corporate governance that can flow from a court ruling.
* It is unlikely, however, that the CLERP 9 proposals would have produced a different outcome in Southcorp's case. It is intended that the infringement notice regime will apply only to "minor" contraventions. ASIC and Southcorp agreed that the contravention by Southcorp was "serious".
* **4.3 Company officers and the recognition of fiduciary obligations to joint venturers**

(By Simon Morris and Wendy Shang, Corrs Chambers Westgarth)Southern Cross Mine Management Pty Ltd v Ensham Resources Pty Ltd [2003] QSC 402, Supreme Court of Queensland, Chesterman J, 26 November 2003.The full text of this judgment is available at: [http://cclsr.law.unimelb.edu.au/judgments/states/qld/2003/november/2003qsc402.htm](http://cclsr.law.unimelb.edu.au/judgments/states/qld/2003/november/2003qsc402.htm%22%20%5Ct%20%22_new) or[http://cclsr.law.unimelb.edu.au/judgments](http://cclsr.law.unimelb.edu.au/judgments%22%20%5Ct%20%22_new)**(a) Summary**This case concerned a joint venture operated by a company where the joint venturers were also the shareholders of the company. The joint venturers brought actions against the officers of the company alleging that they had breached their fiduciary obligations to them by providing them with misleading information. The court confirmed the principle that the officers of a company generally owe their fiduciary obligations to the company and not to the shareholders. In some circumstances, however, a fiduciary relationship may arise by virtue of particular circumstances or dealings between an officer and a shareholder. However, such fiduciary duties cannot be concurrent with or identical in subject matter to the fiduciary duties owed to the company.**(b) Facts**The first defendant, Ensham Resources Pty Ltd (“Ensham”), operated an open cut coalmine in Central Queensland. The second, third, fourth and fifth defendants were the shareholders of Ensham in the proportions: 37.5 percent, 47.5 percent, 10 percent and 5 percent (together the “JV parties”). They also held interests, as joint venturers, in a mining venture known as the Ensham Coal Joint Venture (“Ensham coal project”) in the same proportions as their respective shareholding in Ensham. Emsham was the operator of the Ensham coal project and, at all material times, acted for and on behalf of the JV parties. Ensham owned and operated two draglines to remove overburden from the coal seal. However, in 1999, Ensham decided that it required additional stripping capacity and started searching for a new dragline.All decisions with respect to the Ensham coal project were made via a joint venture management committee (“the Committee”). The two key officers of the project were Kenneth Foots (“Foots”), the chief executive officer of Ensham, and Raymond Bird (“Bird”), the mine manager. Foots and Bird often attended the Committee meetings to give advice and make recommendations with regards to the Ensham coal project. When asked about purchasing a new dragline, Foots informed the Committee that the only dragline available on the market was small and the vendor would not sell it to Ensham because it was a competitor. Instead, the vendor agreed to sell it to the plaintiff, Southern Cross Mine Management (“Southern Cross”) who would enter into a contract with Ensham to strip overburden at an agreed rate (“the dragline agreement”). On 16 September 2002, Ensham rescinded the dragline agreement and did not pay for a substantial amount of work performed by Southern Cross. Southern Cross sued to recover the unpaid amount.Ensham resisted the claim and counterclaimed against Foots and Bird and their companies. **(i) The Counterclaim** Ensham and the JV parties claimed that Foots and Bird owed fiduciary obligations to Ensham and the JV parties and breached these obligations by informing the Committee that Southern Cross’ dragline was the only dragline available on the market when, in truth, a larger capacity dragline could have been purchased or leased by Ensham resulting in a more efficient and economical mine. Ensham and the JV parties claimed that they both suffered loss as a result of this alleged breach.The JV parties argued that fiduciary obligations were owed to them on the following basis:          Ensham held assets on trust for the joint venturers and acted for and on behalf of the joint venturers.          Foots and Bird were employed by Ensham to help implement the objectives of the joint venture and the Committee.         Foots and Bird attended Management Committee meetings to give advice and make recommendations to the JV parties’ representatives.         By reason of their experience in coal mining, Foots’ and Bird’s knowledge and understanding of the operations were superior to that of the joint venturers.         The JV parties trusted and placed confidence in Foots and Bird and expected them to act in their best interests.          Foots and Bird held an interest in Southern Cross and stood to profit from the performance of the dragline agreement.         The JV parties were vulnerable to being misled by Foots and Bird through the information and advice given to them. Therefore, Ensham and the JV parties argued that Foots and Bird owed them a fiduciary duty to act in their best interests and not to profit from their position as fiduciaries.**(ii) Arguments by Foots and Bird**Foots, his company and Bird sought orders to strike out the claim made against them by the JV parties. In particular, they sought to strike out the JV parties from the prayer for relief where it was alleged that the JV parties suffered loss as a result of Foots’ and Bird’s breach of fiduciary duty. Although Foots and Bird were not directors but employees, arguments proceeded on the basis that their duties were akin to directors’ duties. Foots and Bird relied on the rule in Brunninghausen v Glavanics (1999) 46 NSWLR 538 (“Brunninghausen”) and Charlton v Baber (2003) NSWSC 745 that “a director’s fiduciary duties are owed to the company and not its shareholders”. In these cases, the courts recognised that ‘where a director has a fiduciary duty to his company, equity prevents the recognition of a concurrent and identical duty to the shareholders covering the same subject matter’. Therefore, Foots and Bird argued that they did not owe a fiduciary duty to the JV parties because a duty was already owed to Ensham which was identical in scope and content. **(c) Decision**The court upheld Foots’ and Bird’s argument that they did not owe fiduciary obligations to the JV parties. It relied on Pilmer v Duke Group Ltd (in liquidation) (2001) 207 CLR 165 in which Dawson and Toohey JJ made clear that not every relationship involving trust and confidence is a fiduciary one. In the present case, there was no precise legal relationship between Ensham and the JV parties other than the shareholding. The court upheld the principle in Brunninghausen that a director’s fiduciary duties are generally owed to the company and not its shareholders. There is good reason for this rule since if each shareholder had a personal right against the company officers, directors would be exposed to a multiplicity of actions.However, this does not mean that a director can never owe a fiduciary duty to shareholders in relation to dealings in their shares. The court acknowledged that, in some circumstances, a director may owe fiduciary obligations to the shareholders of the company of which he is director or employee where such duty “springs from particular dealings in particular circumstances between them”. In Brunninghausen, Handley JA recognised the several categories in which such a duty would arise including where:         the directors, on behalf of the company, seek further capital from their shareholders or are issuing new shares;         an outsider is looking to buy all the shareholding in a company and the directors have particular knowledge of the value of the shares and the worth of the offer;         the directors are proposing resolutions which will affect the undertaking of the company for adoption by a general meeting; and         a director/majority shareholder is negotiating for the acquisition of a minority shareholder’s interest: Brunninghausen.However, it should be noted that a duty owed to shareholders cannot be concurrent with and identical to the fiduciary duties owed to the company with respect to the company’s property or undertaking. Chesterman J recognised that a fiduciary duty concerning the operation of the company’s affairs would generally be a duty owed to the company and not to the shareholders. In the present case, the transactions in which the JV parties said the fiduciary obligations should have been observed were those concerning Ensham in the operation of the mine. If Foots and Bird owed a duty to the joint venturers, it would be precisely the same duty owed to Ensham (i.e. to minimise costs with respect to the coal project and to perform their contract of employment with Ensham loyally). The consequence of a breach of that duty would be Ensham’s loss of opportunity to acquire the larger dragline. Therefore, the court held that it was unnecessary to recognise a fiduciary duty owed to the JV parties. Foots and Bird were successful in obtaining an order to strike out the JV parties from the prayer for relief. In particular, the phrase alleging that “the JV parties” suffered loss in consequence of the Foots’ and Bird’s breaches of fiduciary duty was struck out. The loss was clearly Ensham’s.Foots and Bird were not however successful in obtaining an order to strike out the joint venturers’ counterclaim altogether. The court held that such an order should not be made unless it was clear that no possible reformulation of the claim could succeed, and it was not obvious that was the case. **4.4 Self-exposure to a penalty – whether imposed for a ‘punitive’ or ‘protective’ purpose**(By Erica Martin, Mallesons Stephen Jaques)Rich & Silbermann v the Australian Securities & Investments Commission [2003] NSWCA 342, New South Wales Court Of Appeal, Spigelman CJ, Ipp JA McColl JA, 26 November 2003The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2003/november/2003nswca342.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2003/november/2003nswca342.htm%22%20%5Ct%20%22_new) or[http://cclsr.law.unimelb.edu.au/judgments](http://cclsr.law.unimelb.edu.au/judgments%22%20%5Ct%20%22_new)**(a) Facts** The Appellants (Rich & Silbermann) are former directors of One.Tel (in liq) (“the company”). ASIC (the Respondent) alleges a number of contraventions by the Appellants of section 180(1) of the [Corporations Act 2001 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) in their discharge of that office. The Respondent sought declarations of the alleged contraventions (section 1317E), orders disqualifying the Appellants from management of companies (sections 206C and 206E) and orders requiring compensation to be paid by the Appellants to the company (section 1317H). The Respondent applied to Justice Austin for interlocutory orders compelling the discovery of documents and filing of witness statements (including statements of the Appellants’ anticipated testimony) by the Appellants in the proceedings in respect of those contraventions. The Appellants resisted the application on the ground that the interlocutory orders would require the Appellants to expose themselves to a penalty, namely the orders sought by ASIC. The Respondent argued that the final orders involved no imposition of a penalty, the disqualification orders being sought for a protective purpose, so that the privilege against self-exposure to a penalty was not available to the Appellants. Justice Austin held that the proceedings did not seek the imposition of a penalty and the privilege did not apply, and granted the Respondent’s application. The Appellants challenged his Honour’s characterisation of the proceedings as not punitive, seeking in particular to emphasise the severity of the consequences of disqualification for a company director.**(b) Decision** Held per Chief Justice Spigelman, Justice Ipp agreeing, Justice McColl dissenting):         The characterisation of a statutory sanction as a penalty for purposes of the privilege against self-exposure to a penalty is affected by whether the sanction is imposed for the purpose of punishment.          The characterisation referred to above is also affected by the severity of the consequences of the sanction.          The distinction between a ‘punitive’ and a ‘protective’ purpose to be served by imposing a sanction has been drawn in a number of areas of the law.          This distinction referred to has frequently been made in the corporations law context, including with respect to disqualification orders.          The history and statutory context of the power to disqualify a person from managing corporations, indicate that a disqualification order is protective. The privilege against self-exposure to a penalty does not apply to a proceeding for the orders sought by ASIC.          The distinction between a ‘punitive’ and a ‘protective’ purpose is of considerable significance as it determines the scope of considerations relevant to the exercise of the power to make a disqualification order. **4.5 Admissibility of expert evidence**(By Anna Taylor, Blake Dawson Waldron)ASIC v Vines [2003] NSWSC 1095, New South Wales Supreme Court, Austin J, 25 November 2003The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2003/november/2003nswsc1095.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2003/november/2003nswsc1095.htm%22%20%5Ct%20%22_new) or[http://cclsr.law.unimelb.edu.au/judgments](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2003/november/2003nswsc1095.htm%22%20%5Ct%20%22_new)**(a) Summary**ASIC alleged that the three defendants had contravened section 232(4) of what was then the Corporations Law, and that the third defendant had contravened section 232(2). ASIC sought to admit expert opinion evidence on the standard of competence of each of the defendants. The Court concluded that the experts' opinions were generally admissible, however admissibility would have to be considered on a paragraph by paragraph basis.**(b) Facts**ASIC alleged that the three defendants had contravened section 232(4) of what was then the Corporations Law, and that the third defendant had contravened section 232(2). Section 232(2) required an officer of a corporation to act honestly in the exercise of his or her powers and in the discharge of his or her office. Section 232(4) provided that an officer of a corporation must exercise the degree of care and diligence that a reasonable person in like circumstances would exercise.The allegations related to the defendants' roles, while employed by the GIO Group, in the preparation of the reinsurance component of the profit forecast in GIO's Part B Statement, issued in response to AMP's takeover bid in December 1998.ASIC sought to read three affidavits as expert evidence. ASIC sought to read an affidavit of Mr Hogendijk in its case against the first defendant, Mr Vines. ASIC also sought to read an affidavit of Mr de Vroome in its case against the second defendant, Mr Robertson, and another affidavit of Mr de Vroome in its case against the third defendant, Mr Fox. Mr Hogendijk gave his opinion on the first defendant by reference to the standard of a reasonably competent chief financial officer. Mr de Vroome gave his evidence on the second and third defendants by reference to the standard of a reasonably competent reinsurance manager.The defendants sought the exclusion of the three affidavits on three grounds. Firstly, it was contended that the affidavits were inadmissible opinion evidence not falling within section 79 of the [Evidence Act (NSW)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=4459" \t "default). Secondly, it was contended that Mr Hogendijk's evidence was irrelevant because it addressed the wrong question. Thirdly, it was submitted that the evidence should be excluded under section 135 of the [Evidence Act (NSW)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=4459" \t "default), on the discretionary ground that its value was substantially outweighed by the danger that the evidence might cause or result in undue waste of time. The Court only dealt with the first and third grounds.**(c) Decision****(i) Admissibility under section 79**Section 79 of the [Evidence Act (NSW)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=4459" \t "default) allows opinion evidence to be admitted if the opinion is based wholly or substantially on the person's specialised knowledge, acquired through training, study or experience. The Court stated that the application of section 79 to opinion evidence contained in an affidavit depended upon:         whether the deponent had specialised knowledge based on his training, study or experience; and         whether the evidence was evidence of an opinion of the deponent that was wholly or substantially based on that knowledge.The Court first examined the meaning of 'specialised knowledge'. The Court noted that the concept of specialised knowledge is not restrictive; it encompasses knowledge formally acquired through training or study, as well as knowledge based on experience. It is more than the observations of a non-participating onlooker. Specialised knowledge requires there to be a sufficiently organised or recognised body of knowledge, accepted as a reliable body of knowledge or experience. The Court stated that there also needs to be a general standard of professional diligence or competence that can be applied.The Court then examined the issue of determining whether an expert's opinion is wholly or substantially based on specialised knowledge. In examining this issue, the Court concluded the following:         a professional may give evidence about the content of general practices of professionals in his or her field;         a professional can go beyond the content of general practices, by expressing an opinion about the practice of competent and careful professionals in specified circumstances which are recurring or typical;         a professional can give evidence of what, in precisely stated circumstances which are out of the ordinary, a competent and careful professional would be expected to do;         expert evidence directed to answering a question of law or fact that is directly before the Court is inadmissible;         evidence of an expert as to what he or she would do in the stated circumstances is inadmissible;         the expert must demonstrate how his or her specialised knowledge applies to the assumed or proven facts;         so far as the opinion is based on facts observed or assumed by the expert, such facts must be identified and proved;         the Court must be satisfied on the balance of probabilities that the opinion is wholly or substantially based on the expert's knowledge; and         the opinion of an expert is not admissible if it amounts to nothing more than a submission.The Court first examined Mr Hogendijk's specialised knowledge. Despite counsel for Mr Vines submitting that the field in which Mr Hogendijk expressed his opinion was not one of specialised knowledge, the Court disagreed. The Court held that Mr Hogendijk's evidence would identify a common set of responsibilities borne by CFOs, that it would show that he occupied the office of CFO over a substantial period of time and that therefore he must have acquired specialised knowledge about the core set of responsibilities. Counsel for Mr Vines submitted that Mr Vines' role differed from many of the core responsibilities of a CFO, and therefore Mr Hogendijk's evidence should be excluded. The Court held that as the hearing was still incomplete, it was not possible to determine at this stage whether that was the case, and therefore was not a sufficient ground to exclude Mr Hogendijk's evidence. The Court also held that it was not necessary for Mr Hogendijk to have experience in the same line of business as the GIO Group in order to equip himself to express an opinion about the standard of a reasonably competent CFO.The Court then sought to determine whether Mr Hogendijk's affidavit was wholly or substantially based on specialised knowledge. The Court found that his opinion was carefully expressed in terms of what a competent CFO would have done in Mr Vines' position. His affidavit did not try and answer the 'ultimate issue' and did not try and usurp the function of the trier of fact. He did not purport to give an opinion on what he would have of done if he was in the same position as Mr Vines. He meticulously set out the assumptions on which his opinions were expressed, and there was a general linkage between his field of specialised knowledge and the facts. For these reasons, the Court found that there was no basis for concluding that that the opinions expressed in Mr Hogendijk's affidavit were not wholly or substantially based on his specialised knowledge.The Court looked at similar issues in assessing Mr de Vroome's affidavits. The Court concluded his affidavits supported the view that he had specialised knowledge of the standard of competence and diligence expected of a reinsurance manager of a substantial reinsurance business, based on his experience in working as a reinsurance manager and his overall experience in the reinsurance industry. On the issue of whether the opinion was wholly or substantially based on Mr de Vroome's specialised knowledge, the Court did find some flaws in his affidavits. In particular, the Court found that some of his assumptions were not fully articulated, and that he had engaged in some fact finding. However, these flaws were not so endemic that the affidavits should be wholly or substantially inadmissible.**(ii) Discretionary exclusion under section 135**The Court held that as a substantial portion of the evidence went to technical and complex matters, it had a potential to be useful and so should not be excluded at this stage of the trial. The Court agreed that there was a substantial risk that by the time the trial is over, the usefulness of the evidence may have evaporated for various reasons, such as the true issues not being the ones about which the experts gave their opinions. However, this did not lead to the conclusion that nothing of any use would emerge from the expert opinions. **(iii) Conclusion**The Court concluded that the affidavits of Mr Hogendijk and Mr de Vroome were not generally inadmissible, and that they should not be excluded under section 135. The Court stated that it would be necessary to consider the admissibility of the affidavits paragraph by paragraph.**4.6 Granting an extension of time to lodge a charge after an insolvency event occurs**(By Deborah Beeck, Freehills)Hewlett Packard Australia Pty Ltd v GE Capital Finance Pty Ltd [2003] FCAFC 256, Full Court of the Federal Court, Whitlam, Branson and Allsop JJ, 21 November 2003The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/federal/2003/november/2003fcafc256.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2003/november/2003fcafc256.htm%22%20%5Ct%20%22_new) or[http://cclsr.law.unimelb.edu.au/judgments/](http://cclsr.law.unimelb.edu.au/judgments/%22%20%5Ct%20%22_new)**(a) Summary**This case discusses whether section 266 of the [Corporations Act 2001](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) (“the Act”) allows a court to grant an extension of time to lodge notice of a charge after the commencement of winding up, administration or execution of a deed of company arrangement has occurred. By a majority of two to one, the Federal Court held that an extension could be granted under section 266(4) in such circumstances. The courts discretion to grant an extension is broad, but must be guided by what is “just and equitable”. The discretion must also be exercised in light of the statutory schemes, rights and liabilities which are invoked for the protection of general creditors when the insolvency events in sections 266(1)(a), (b) and (ba) occur. Consequently, where the chargor company is insolvent or its solvency is doubtful, the interests of unsecured creditors is a relevant consideration.Interestingly, the Court’s preferred interpretation of section 266, based on the historical development of the provision, was that this section did not contemplate an order for extension of time after an insolvency event has occurred. The majority felt bound by recent authority, however, and deferred to the High Court’s jurisdiction to determine the matter differently.**(b) Facts**Under an agreement dated 28 October 2002, GE Capital Finance Pty Ltd (“GE”) provided a $35 million revolving credit facility, including a $500,000 letter of credit sub-facility, to Daisytek Australia Pty Ltd (“Daisytek”). As security for the loan, Daisytek granted GE a fixed and floating charge over all its assets under a deed of charge dated 22 November 2002. Due to innocent inadvertence, notice of the charge was not lodged within the 45 day period prescribed in section 263 of the Act (that is, by 6 January 2003). On 4 March 2003, GE’s solicitors became aware of this fact and the form was subsequently lodged on 14 March.On 16 May 2003, the directors of Daisytek resolved that the company was insolvent or likely to become insolvent in future and an administrator was appointed under Part 5.3A of the Act. On 22 May 2003, an application was made to the court under section 266(4) of the Act for an order extending the period in which notice of the charge could be lodged.On 13 June 2003, the primary judge made an order extending the period for lodgement up to and including 14 March 2003 on the condition that the charge would only be enforceable when the amount owing under a facility agreement between GE, Daisytek and a related company of Daisytek exceeded $3.7 million and only in respect of any amount owing in excess of $3.7 million.Hewlett Packard Australia Pty Ltd (“HP”), an unsecured creditor and major supplier of Daisytek, appealed this decision. GE cross-appealed, seeking removal of the condition to the extension.**(c) Decision**By a majority of two to one (Whitlam J dissenting), the Full Court of the Federal Court dismissed both the appeal and the cross-appeal. In coming to this conclusion, the Court identified three key issues, namely:         does section 266 empower the court, after commencement of winding up, administration or entry into a deed of company arrangement, to extend the period for lodging notice of a charge;         if such an order could have been, but has not yet been, made by the critical day, is the charge void or voidable on the critical day; and          what principles apply in determining whether to grant an extension of time after an event in sections 266(1)(a), (b) or (ba) has occurred.The “critical day” is defined in section 266(8) as the day winding up commenced or, in the case of administration or deed of company arrangement, the day the relevant administration commenced.**(i) Can an extension be granted after an insolvency event has occurred?**Section 266(1) relevantly provides that where winding up, administration or a deed of company arrangement is in place, a registrable charge is void against the liquidator or administrator unless the charge was registered within 45 days or such other period as extended by the Court under section 266(4).Resolution of the first issue is a matter of statutory construction based on the development of the legislation and corresponding case law. In the main judgment, Allsop J reviewed the historical development of section 266(1) and (4) and its predecessors. Before 1981, the predominant view was that an extension under the equivalent of section 266(4) would only be granted on the condition that the charge was subject to the rights of secured creditors whose interests were created before registration. Once liquidation occurred or was imminent, an extension was rarely granted as the rights of general creditors had or would soon crystallise under the statutory schemes for insolvency.Since the Companies (State) Codes 1981, however, the case law in Australia has supported the contrary view that the court can grant an extension after the critical day: Douglas-Brown as liquidator of De Barros Nominees Pty Ltd (in liq) v Standard Chartered Finance Ltd (1990) 8 ACLC 993 (Full Court WA Supreme Court).Consequently, the majority in this case felt bound by precedent, as an intermediate appellate court can only overturn a decision of another intermediate appellate court which is “plainly wrong”: Australian Securities Commission v Marlborough Gold Mines Ltd (1993) 177 CLR 485.With this threshold issue decided, the Court went on to assess the position of unsecured creditors in relation to granting an extension.**(ii) Is an unregistered charge, in the absence of an extension, void on the critical day?**GE asserted that since an extension could be granted after an insolvency event had occurred, an unregistered charge is void unless an extension is granted on or after the critical day. That is, the charge is not necessarily void against the liquidator or administrator, and the rights of unsecured creditors are subject to the Court’s power to extend the period for lodgement of the charge at some future time.The Court rejected this argument and confirmed that an unregistered charge is void “unless and until” it is revived by a subsequent order of the Court under section 266(4). The Court pointed to the temporal language of section 266(1) and stated it was unlikely that Parliament intended to prolong any uncertainty about the status of the charge or the rights of the creditors, liquidator or administrator affected by the charge.**(iii) When should an extension be granted under section 266(4)?**Section 266(4) states that the Court may extend the period for lodging notice of a charge where the failure to lodge was either accidental or inadvertent, or would not prejudice the position of creditors or shareholders. An extension may also be granted where it would be just and equitable to grant the extension.The Court held that its discretion to grant an extension is broad, but it must be guided by what is “just and equitable”. Regard should be had to the effect of an extension on the statutory schemes, rights and liabilities which are invoked when the insolvency events in sections 266(1)(a), (b) and (ba) occur, for the benefit of general creditors. The interests of unsecured creditors becomes a particularly relevant consideration where the chargor company is insolvent or its solvency is doubtful. The conduct or facts surrounding an administration may also be relevant to the decision.Although past cases referred to an extension being granted in “exceptional circumstances”, this is not a separate requirement of section 266(4). Instead, the phrase illustrates that the circumstances must be sufficient to justify the effect an extension has in defeating the rights of general creditors, particularly in a winding up.GE put forward an unsuccessful argument that the Court should only consider the interests of unsecured creditors who would actually be prejudiced by an extension, for example, because they relied on the incorrect register of charges. The Court reiterated that an extension affects the rights of creditors generally, so broader consideration of the facts and circumstances is relevant.**4.7 Irregularities in a share buy back scheme found to require complete re-commencement of process**(By Cameron Sinclair, Phillips Fox)In the Matter of Village Roadshow Limited [2003] VSC 440 & In the Matter of Village Roadshow Limited (No.2) [2003] VSC 456, Supreme Court of Victoria, 20 November 2003 and 14 November 2003 respectivelyThe full texts of these judgments are available at: [http://cclsr.law.unimelb.edu.au/judgments/states/vic/2003/november/2003vsc440.htm](http://cclsr.law.unimelb.edu.au/judgments/states/vic/2003/november/2003vsc440.htm%22%20%5Ct%20%22_new) and [http://cclsr.law.unimelb.edu.au/judgments/states/vic/2003/november/2003vsc456.htm](http://cclsr.law.unimelb.edu.au/judgments/states/vic/2003/november/2003vsc456.htm%22%20%5Ct%20%22_new) or[http://cclsr.law.unimelb.edu.au/judgments/](http://cclsr.law.unimelb.edu.au/judgments/%22%20%5Ct%20%22_new)**(a) Summary**VRL sought to conduct a buy back scheme of its A Class preference shares. VRL failed to notify combined shareholders of their right to vote against the buy back. Such shareholders were notified later by way of advertisements. Preference shareholders who were also entitled to vote against the scheme were not notified at all. Mandie J found that the rights of VRL preference shareholders were abrogated by the buy back scheme. His Honour further found that preference shareholders were not absolutely prohibited from voting in the scheme; only from casting votes in favour of the scheme. A separate meeting need not have been held for each group of preference shareholders. Mandie J dismissed Village Road Show’s application for the scheme to be approved. In the Matter of Village Roadshow Limited (No 2) [2003] VSC 456 Mandie J rejected VRL’s suggestion that the general meeting be adjourned, or ASIC’s suggestion that a fresh general meeting be called. Mandie J held that VLR ‘had to start again.’**(b) Facts**         Village Road Show Limited (“VRL”) sought to implement a scheme to buy back A Class preference shares. The key features of the ‘buy back’ scheme were:o        Acceptance of the terms of the scheme to be compulsory for all A Class preference shareholders;o        VRL was to pay $1.25 for each share with 25 cents to be paid in cash and the balance would be used to purchase an unsecured interest-bearing note.         An independent expert noted that the holders of the preference shares were likely to be better off if the scheme was approved.         Under section 411 (1) of the [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default), (“the Act”), VRL applied to the Supreme Court for a class meeting of preference shareholders. In addition, VRL applied for an order which approved the explanatory statement to accompany the notice of meeting.         On 26 September 2003, the Court ordered that VRL convene a meeting of the holders of A Class preference shares to consider and, if desired, approve the buy back scheme.         The explanatory statement stated that the buy back must be approved at a general meeting by a special resolution of ordinary shareholders. It also stated that preference shareholders and their associates were not permitted to vote on the buy back scheme and that such prohibited votes were to be disregarded. This prohibition was questioned by ASIC which interpreted the relevant section (257D) as only excluding votes cast in favour of the resolution by the interested preference shareholders.          On 30 October 2003, an announcement was made to the ASX and advertisements were published in prominent newspapers which corrected VRL’s misinterpretation. The advertisement invited previously excluded shareholders with both ordinary and preference shares to vote at the general meeting.          The general meeting and the Scheme Meeting were held on 3 November 2003. The general meeting was adjourned until after anticipated Court hearings which would consider approval of the scheme. A special resolution approving the buy back was obtained at the general meeting.          VRL sought an order that the passage of the special resolution was valid despite the misinterpretation of section 257D. Boswell Filmgellschaft mBH, (“Boswell”), a preference shareholder which had previously tried to adjourn the General and Scheme meetings, opposed VRL’s request. Boswell submitted that:o        Preference shareholders were denied their entitlement under VRL’s constitution, to vote on the buy back resolution at the general meeting. o        Only shareholders holding both preference and ordinary shares were permitted to vote.o        Ordinary shareholders were not reasonably informed of their entitlement to vote against the buy back scheme.o        Two class meetings should have been held. One meeting for preference shareholders who also held ordinary shares, and another meeting for shareholders who only held preference shares. o        It was not possible, or alternatively not appropriate, for the Court to disregard or remedy these matters and approve the scheme.**(c) Mandie J’s Judgment****(i) Were the rights of VRL preference shareholders abrogated by the buy back scheme?**In considering this issue, Mandie J distinguished the present situation from the leading cases In the Matter of Fowlers Vacola Manufacturing Co Limited [1966] VR 97 and House of Fraser plc v ACGE Investments Limited [1987] 1 AC 387. In both of these cases the respective Courts found that the rights of the preference shareholders under each company’s constitution were not abrogated by proposed reduction of capital schemes. In Fowlers Vacola the value of the shares had been affected, not the legal rights of the preference shareholders. In House of Fraser the scheme was held to be in accordance with the original conditions of the preference share issuance. Distinguishing these two cases, Mandie J found that the VRL buy back scheme was analogous to the scheme in Re Allgas Energy Ltd (1998) 27 ACSR 729. The Court in Allgas found that a company’s scheme to cancel its preference shares was an abrogation of the preferential shareholders’ rights. In reaching this decision, Mandie J argued that the buy back resolution and the scheme would automatically entitle VRL to buy back all of the preference shares. This action was not within the scope of the rights attaching to the preference shares.**(ii) Were the preferential shareholders entitled to vote for the buy back scheme?**At issue was the correct interpretation of section 257D(1)(a) of the Act. This section excluded affected preference shareholders from casting votes in favour of a preference share buy back scheme. Mandie J found that the words ‘mean what they say’. Both preference shareholders and combined shareholders were permitted to vote in the buy back resolution but those in favour would not be counted. The former were not informed of their right to do so, while combined shareholders were only notified by a very late series of advertisements. Votes cast by a member, Granada, in favour of the buy back resolution were not to be counted. Although still a registered preferential shareholder at the relevant date, G had recently sold its preferential shareholding. **(iii) Should a separate meeting be held for each class of preferential shareholder?**There was not a sufficient ‘dissimilarity of interest’ between the preferential shareholders and the combined shareholders to justify holding separate class meetings. **(iv) The effect of these irregularities at the general meeting**VRL argued that even if the votes of combined shareholders were counted, the requisite majority still remained. VRL also submitted that its failure to inform the relevant shareholders was a ‘procedural irregularity’ within the meaning of section 1322 (2) of the Act. Mandie J did not accept these submissions. His Honour was not convinced that these irregularities did not cause substantial injustice. Mandie J did not want to speculate that the outcome of the general meeting would have been the same without these irregularities. Mandie J dismissed VRL’s application for its scheme to be approved.  (d) In the Matter of Village Roadshow Limited (No 2) (a continuation of Mandie J’s reasoning in the above case)  VRL suggested that the general meeting be adjourned, and that the buy back Scheme should be put again to the meeting. Mandie J agreed with VRL’s submission that the buy back scheme was ‘unfinished business’ for the purposes of VRL’s constitution. However, Mandie J was not convinced that this would be an ‘appropriate’ course of action. There was no guarantee that the persons entitled to vote at the November general meeting would be substantially the same as those entitled to vote at the December meeting. Mandie J also held that the two stage approval process adopted by the company would be undermined by the adjournment of the meeting. The process involved stage one, approval of the scheme at the general meeting, and stage two, a dedicated scheme meeting. Preference shareholders who have voted in the scheme meeting would be denied the ability to consider the results of the general meeting. The alternative, ASIC’s submission to hold a fresh general meeting, was not agreed to by Mandie J. His Honour deemed that such a course would be undermined by the same constituency determination problem. VRL’s application for the adjournment of the general meeting was therefore rejected by Mandie J. His Honour concluded that VRL needed to commence the buy back process again. **4.8 Misleading Advertising – Bank’s Promises on Home Loans**(By Elizabeth O’Donovan, Deacons) Australian Competition and Consumer Commission v Commonwealth Bank of Australia [2003] FCA 1129, Federal Court of Australia, Conti J, 17 October 2003The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/federal/2003/october/2003fca1129.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2003/october/2003fca1129.htm%22%20%5Ct%20%22_new) or[http://cclsr.law.unimelb.edu.au/judgments/](http://cclsr.law.unimelb.edu.au/judgments/%22%20%5Ct%20%22_new)**(a) Summary**The Australian Competition and Consumer Commission (ACCC) brought proceedings against the Commonwealth Bank (Bank) for misleading and deceptive conduct in relation to a series of television advertisements (TV Adverts) as well as promotional material used on posters in various branches of the Bank (Posters).The Bank produced a series of T.V. Adverts which represented to members of the public that no establishment fee was payable in respect of the Bank’s home loans. However, not every type of home loan granted by the Bank during the relevant period was made available to customers upon the basis that no establishment fee was payable.The ACCC pleaded that the Bank, by its conduct in broadcasting the T.V. Adverts and displaying the Posters in its branches, had committed misleading and deceptive conduct under sections 52, and the bank has also breached sections 53(c), 53(e), 53(g) of the [Trade Practices Act 1974](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6426" \t "default) (TPA).The ACCC also submitted that the failure to adequately reveal the existence of conditions attached to the home loans was of particular significance as the T.V. Adverts and the Posters contained the word “free” which would create a lasting impression on the target audience of the T.V. Adverts as well as customers of the Bank.The ACCC was granted relief in the form of corrective advertising by way of a television broadcast comprising thirty seconds for one week. The Bank was also ordered to place in-branch advertising comprising of a large framed notice adjacent to the main public entrance door of each head office and branch of the Bank during that same week. The Bank was ordered to pay the ACCC’s costs of the proceedings. **(b) Facts**During Channel 9’s coverage of the international cricket matches, the Bank released 3 different T.V. Adverts to be screened in Australia on Channel 9 entitled ‘Blood Nut’; ‘Where’s the Action’; and the ‘Sick Boy’.The first segment of the T.V. Adverts featured a humorous incident, the second segment included a voiceover, bold text captions and smaller print containing qualifications to the home loan offer at the bottom of the screen which took up approximately 28% of the size of the bold captions. The T.V. Adverts lasted for 30 seconds and had been broadcast by Channel 9 over 200 times across Australia. The Bank also displayed Posters in various branches which essentially contained the same representations in relation to the “no establishment fee payable” on home loans.Each of the T.V. Adverts represented that customers did not have to pay any establishment fees in relation to the Bank’s home loans. The ACCC pleaded that those representations were misleading and deceptive principally on the basis that:          not all the home loan applications made to the Bank for home loans made during the televised advertising period were granted on the basis that no establishment fee was payable;         within the categories of discounted home loans to be offered by the Bank in the T.V. Adverts, and in respect of applications to the Bank for such home loans made during the televised period, not every home loan provided was made available from the Bank upon the basis that the establishment fee was discounted; and         each of the T.V. Adverts failed to disclose that in order to obtain the Bank’s home loans without the payment of an establishment fee or a discounted price of the establishment fee, an applicant would need to either already hold, or to obtain, two or three additional products of the Bank (such as a credit card or deposit account), depending on the size of the loan.In addition to the pleadings set out above, the ACCC submitted that the text included in the T.V. Adverts which provided that the offer was subject to other conditions (including other fees and charges being payable) (Conditions), were not sufficient to prevent the representations from being misleading and deceptive to viewers because the Conditions were:          in a print size that was so small compared to the print size of the bold text caption ‘No Establishment Fee’ that customers were unlikely to read the television advertisement conditions at all;         in a location at the bottom of the advertisement so removed from the location of the bold text caption ‘No Establishment Fee’ that customers were unlikely to read the television advertisement conditions at all;         appeared for such a short period of time that there was insufficient time for customers to read the television advertisement conditions at all; and         so lacking in any other form of prominence or emphasis that customers were unlikely to read the television advertisement conditions at all. Additionally, the ACCC pleaded that, to the extent the Conditions were able to be read and understood, the representations were misleading and deceptive on the following basis:          by failing to indicate that in order to obtain home loans without the payment of an establishment fee customers would have to either already hold or obtain two or three additional products of the Bank (depending upon the size of the loan), customers were unlikely to have associated the television advertisement conditions with such a requirement;         the words ‘Limited offer’, ‘Limited offer for selected Home Loans’ and ‘Minimum loan amount’ conveyed only that the offer was not available with respect to all home loans;         the words ‘Other fees and charges are payable’ conveyed only that fees and charges (other than establishment fees) were payable in relation to the home loan in respect of which the application was being made, and not that a customer would have to either already hold or obtain two or three additional products of the Bank; and         the words ‘conditions apply’ conveyed only that not every customer was eligible for a home loan due to, inter alia, the prudential and credit requirements of the Bank.The ACCC also submitted, on essentially the same terms, that the Posters displayed in the various branches of the Bank were misleading and deceptive to customers.The Bank, in its defence, submitted that the T.V. Adverts or Posters were not misleading or deceptive in any way. The Bank submitted that the T.V. Adverts and the Posters did not represent that the home loan offer was unconditional. In particular, the Bank submitted that the T.V. Adverts merely caused the viewer to take the next step, which was to contact the Bank in relation to the home loan, and following inquiries with the Bank, the customer would no longer be misled as to the home loan offer. Conti J did not consider that submission answered the pleadings of misleading and deceptive conduct submitted by the ACCC. (c) Decision Conti J commented that his objective assessment of the alleged misleading and deceptive conduct would not be based on consumers who were exceptionally intelligent or exceptionally gullible, but rather his Honour would consider a range of hypothetical persons somewhere in the middle of those categories.Conti J accepted the ACCC’s submission that the use of the word “free” in advertising has a particularly strong attraction unless adequately qualified and therefore, it was a considerable factor when determining whether the T.V. Adverts and Posters produced by the Bank had been misleading or deceptive.In conclusion, Conti J held that the T.V. Adverts and the Posters were misleading and deceptive under section 52 of the TPA and were also in breach of sections 53(c), 53(e) and 53(g) of the TPA.The Bank was ordered to product corrective, television advertising and corrective in-branch advertising at a cost of $325,000 as well as pay the costs of the ACCC. |
| **5. Corporate Law Conference Announcement** |
| Corporate Law Teachers’ Association Annual Conference 2004“Regulating Corporations”, 8-10 February 2004, The Australian National University, Canberra, AustraliaDebates about how and why we should regulate corporations have been given renewed vigour in the early years of the 21st century. The theme of this conference invites presenters to reconsider these debates - are we looking at the same old arguments about regulation v de-regulation, or investor protection v efficiency, or have there been shifts in the way we conceive of corporate regulation?Topics to be considered include:         the contemporary relevance of the legal model of the corporation         whether regulatory goals are best achieved via a framework of legal duties, or social responsibilities and ethical standards         the regulatory role of the 'market'         the globalisation of corporate regulation         the role and regulation of corporate professional advisorsSpeakers include:Professor John Parkinson, Professor of Law, University of Bristol and Professor Janet Dine, Professor of Law, University of EssexFurther details are available from the [CLTA](http://users.austlii.edu.au/clta/%22%20%5Ct%20%22_new) website.  |
| **6. New Corporate Law Book - Synthetic, Insurance and Hedge Fund Securitisations** |
| "Synthetic, Insurance and Hedge Fund Securitisations", which was launched on 9 December 2003, is an in-depth guide to structuring the vast array of innovative securitisations.  Paul Ali and Jan Job de Vries Robbe have combined their extensive legal and banking experience and knowledge to develop the first book to discuss in detail the design and regulation under Anglo-Australian law of synthetic securitisations, insurance-linked securities, and hedge fund, intellectual property and whole business securitisations.  Paul is a member of the Centre for Corporate and Securities Regulation at The University of Melbourne.  Jan Job is a lawyer (admitted in the Netherlands) with Minter Ellison.  The book also includes a foreword by Professor Steven L Schwarcz of Duke Law School.Chapters: (1) Securitisation - An Introduction; (2) Credit Derivatives - The Gateway to Synthetic Securitisation; (3) Synthetic Securitisation - Should Every Bank have One?; (4) Synthetic Arbitrage - Merger of Credit Derivatives, Securitisation and Asset Management; (5) Insurance Securitisation - Convergence of the Insurance and Capital Markets; (6) Hedge Fund Securitisation - Repackaging Funds of Hedge Funds; (7) Intellectual Property Securitisation - Crystallising the Value of Brand Names and Ideas; (8) Whole of Business Securitisation - Unlocking the Wealth Within.For further information about the book, please contact Ms Trina Berry, Thomson Legal & Regulatory Limited at 61 (2) 8587 7075. |
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